No. 26 Orig

FILED
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JAMES D. MAHER,
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IN THE

Supreme Court of the United States

IN THE MATTER
of
The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

MOTION FOR WRIT OF MANDAMUS OR OTHER APPROPRIATE RELIEF and PETITION.

ROGER FOSTER,
Counsel for Petitioner,
55 Liberty Street,
Borough of Manhattan,
New York City.

IN THE

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The Application of ANNIE S. SIMONS, for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or in the alternative for a Writ of Prohibition against the District Court of the United States for the Southern District of New York sitting in Equity; or in the alternative for the Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

And Now comes the petitioner, ANNIE S. SIMONS, by ROGER FOSTER, her attorney, and she moves for leave to file the petition hereto annexed for a Writ of Mandamus, or in the alter-

native, for a Writ of Prohibition, or in the alternative for a Writ of Certiorari, and she further moves that a rule be entered and issued directing the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit who has been designated to hear motions in the District Court of the United States for the Southern District of New York, and directing the District Court of the United States for the Southern District of New York, sitting at Common Law, to show cause why a Writ of Mandamus should not issue against them; and directing said Court to show cause why, in the alternative a Writ of Prohibition or a Writ of Certiorari should not issue against said Court; in accordance with the prayer of the said petition; and why said petitioner should not have such other and further relief in the premises as may be just and meet.

ROGER FOSTER,
Attorney and Counsel for petitioner
Annie S. Simons,
55 Liberty Street,
Borough of Manhattan,
City and State of New York.

To the Honorable Edward Douglass White, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

The petition of ANNIE S. SIMONS, respectfully shows:

1. Your petitioner is a resident of the City of Charleston in the State of South Carolina.

or about the 16th day of May, 1917 an action was begun in the District Court of the United States for the Southern District of New York by your petitioner, as plaintiff, against William Nelson Cromwell and Louis H. Cramer, as executors under the last will and testament of Frank Leslie, deceased, defendants' by the service of the summons therein upon the defendant Cramer. Both the defendants subsequently appeared in said action. The defendant Cramer, by Honorable Edgar T. Brackett of Saratoga, New York; the defendant Cromwell, by Messrs. Sullivan & Cromwell of 49 Wall Street, New York City. The complaint herein was served on the attorneys of said defendants on or about June 15th, 1917. A copy thereof is hereunto annexed marked "A." Issue has been duly joined by the service of the answers of the defendants, copies of which are hereunto annexed marked "B" and "C." That of defendant Cramer was served June 27, 1917; that of defendant Cromwell July 5, 1917. Upon the demand of the defendant Cromwell an undertaking as security for costs was filed on behalf of the plaintiff. On July 10th, 1917 notice of trial at a jury term of the issues raised by said answers was duly served. On or about July 11th, 1917, the case was placed upon the jury calendar of said Court.

II. The complaint therein sets forth two causes of action. The allegations as to the first cause of action set forth: the rendition of certain services by plaintiff as nurse and companion to the defendants' testator, Mrs. Frank Leslie, during a period of fourteen years, in three different States, at the request of said testator. The promise by Mrs. Leslie to compensate plaintiff for said services by be-

queathing to her a legacy of the sum of $50,000. The failure of said Mrs. Leslie to bequeath to the plaintiff more than the sum of $10,000 and the breach of the contract by said testator in this respect. The consequent damage to plaintiff in the sum of $40,000 for which judgment is prayed with interest from the date of the death of said Mrs. Frank Leslie, who bequeathed the greater part of her property to one Mrs. Catt, in order that the same might be used for the purpose of promoting the cause of Woman's Suffrage. The allegations as to the second cause of action in said complaint set forth the same services. They allege: that Mrs. Leslie promised to pay this plaintiff the reasonable value thereof. That the reasonable value thereof was the sum of $50,000. The failure of Mrs. Leslie to pay any part thereof except the sum of $10,000 bequeathed as aforesaid. The consequent damage to plaintiff in the sum of $40,000 with interest from September 17th, 1915. The complaint concludes with a demand for judgment against defendants for the sum of $40,000 with interest as aforesaid and general relief with costs.

III. On or about July 20th, 1917 the defendant served upon petitioner's attorney a notice of a motion "for an order remanding the first cause of action alleged herein to the equity side of the Court and for such other and further relief as may be just, together with the costs of this motion." Said motion came on for argument on September 27th, 1917 before the Honorable Charles M. Hough, U. S. Circuit Judge who upon information and belief, had then been duly designated to hear motions in the District Court of the United States for the

Southern District of New York. Said motion was argued by counsel for the two defendants in support of said motion and by petitioner's counsel, in opposition thereto. The said petitioner's counsel then specifically, orally and subsequently in writing in a brief submitted by him, made as one of the objections to said motion that granting the same would deny to the plaintiff the right to a trial by jury of the issues raised upon the first cause of action, which right was secured petitioner and plaintiff by the Seventh Amendment to the Constitution of the United States; and as another objection thereto, that neither said Court nor said Judge had any jurisdiction or power to grant such a motion or to make such an order as was made thereupon. The said Honorable Judge and the said Honorable Court granted said motion by an order entered on or about October 26, 1917. Said order directed as follows:

"ORDERED that the said motion be and the same hereby is granted, and the first cause of action set forth in the complaint herein be and the same hereby is transferred to the equity side of this Court; and further

"ORDERED that the said first cause of action be and the same is hereby stricken out of the complaint in this action at law (but only for the purpose of transfer as aforesaid) and that plaintiff have (and she is hereby given) twenty days after the service of this order wherein to make such amendment to the complaint herein (after the said striking out and transfer aforesaid) as she may be advised; and further

"ORDERED that the Clerk of this Court do forthwith and as of the date of this order docket as an equity cause the said first cause of action set forth in the said complaint, and the plaintiff is hereby given twenty days from the service of this order wherein to amend or replace on the equity side of this Court, and defendants are hereby given twenty days from the expiration of said twenty days hereinabove given to plaintiff for the filing and service of an amended bill in equity (as the case may be) wherein to answer without prejudice to any motion that said defendants may be advised to make under and pursuant to the rules of the Supreme Court of the United States in equity; and further

"ORDERED that the trial of this action at law be and the same hereby is stayed until (at the earliest) the term of December, 1917, without prejudice to any application that plaintiff may be advised to make for a stay of proceedings or further deferment of trial, when and if said plaintiff takes an appeal or sues out a writ of error or otherwise lawfully seeks to review this order or any part thereof."

IV. The opinion rendered by Judge Hough upon said motion was as follows: "I think the law of New York is clear that plaintiff cannot sustain the first cause of action at law. The use of section 274 to sever an action is new but seems to me proper. Motion granted."

V. In the opinion of your petitioner's counsel, the law of New York does not forbid the bringing of such an action as is described in the first cause

of action in said complaint in an action at common law. On the contrary, the law of New York, as stated in the cases of Lisk against Sherman, which is reported in 25 Barbour, 433, and Lenox against Lenox, which is reported in 126 App. Div., 109, and in other cases, recognizes that such an action could have been sustained at common law and is now triable in the Courts of that State before a jury. By the law of New York there is no longer any distinction between law and equity except in so far as the Constitution of the State of New York in Article I, Section 2, ordains "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

VI. In the opinion of your petitioner's counsel said order denies to your petitioner the right to a trial by jury of the issues raised upon her said first cause of action, which right is guaranteed to your petitioner by the Seventh Amendment to the Constitution of the United States, and such order is not authorized by §274 of the Federal Judicial Code, to which said Judge refers, nor by §274a thereof, nor by any Section of said Code, and neither said Judge nor said District Court had any power to make such an order.

VII. The result of the said motion is to split and sever an action brought at common law, in which the plaintiff demanded the same relief upon two different counts into two separate and independent cases and proceedings, an action at law and a suit in equity. If said order is enforced the termination of the litigation will result in a decree in equity upon the issues raised on the first cause of

action and a judgment at common law upon the issues raised upon the second cause of action. Your petitioner, the plaintiff, will be denied her constitutional right to a trial by jury upon the issues raised upon the first cause of action. Inasmuch as no judgment has been at the present time entered in the action brought by the plaintiff at common law since the proceedings upon the second cause of action are directed to be continued at common law, it seems highly probable that your petitioner cannot now review the said order of Judge Hough by a writ of error. Should your petitioner, the plaintiff herein, continue the first cause of action in equity, and file a bill in equity as directed by said order, undoubtedly the defendants will raise the contention that by so doing she has consented to the severance and has waived her right to insist that she is entitled to continue this suit upon the first cause of action at common law. Moreover, in such a case, it is not impossible that a motion will be made to compel her to elect between the relief which she seeks in equity and the relief which she seeks at common law. When this action is finally determined if the said order of said District Court and of Judge Hough is not set aside, the final decision of the said District Court upon plaintiff's claims will be made in two separate papers, in two separate dockets upon two separate records, a decree in equity and a judgment at common law. The decree in equity can only be reviewed by an appeal. The judgment at common law can only be reviewed by a writ of error. Inasmuch as the order of severance will then become a part of the record in equity, there will be a serious obstacle to the review thereof by a writ of error to bring up the proceedings upon the

second cause of action. Objection will, in all probability, be made to a review of the same upon an appeal from the decree in equity upon the ground that upon such an appeal an order in an action at common law cannot be reviewed. If said order is not set aside, the record will be complicated and the time of the District Court will be needlessly occupied by two distinct trials, one at common law and one in equity. The time of this Court, or of the Circuit Court of Appeals, as the case may be, will be needlessly occupied by two distinct proceedings for review, one at common law and the other in equity.

The effect of said order of said District Court and of said Judge Hough is to stay the proceedings of the District Court sitting at common law upon the first cause of action set forth in the complaint herein and to enjoin perpetually the trial at common law of the issues raised upon plaintiff's first cause of action.

WHEREFORE your petitioner prays that a rule be made and issued from this Honorable Court directed to the said Honorable Charles M. Hough Circuit Judge of the United States for the Second Circuit who has been designated to hear motions in the District Court of the United States for the Southern District of New York and directing the said District Court of the United States for the Southern District of New York sitting at common law to show cause why a Writ of Mandamus should not issue commanding the said Judge and the said Court and each of them to proceed to the trial before a jury of the issues raised by said defendants' answers to the said allegations concerning plaintiff's first cause of action and to

set aside and vacate the said order and to continue to proceed at common law in the said suit upon both causes of action set forth in the complaint therein and to compel the said Judge and the said District Court to proceed and to try before a jury and to proceed to judgment upon both causes of action set forth in the complaint in the suit hereinbefore described; and directing said District Court of the United States for the Southern District of New York sitting in equity to show cause why in the alternative a Writ of Prohibition should not issue forbidding the said Judge and the said District Court of the United States when sitting in equity from continuing to take cognizance in equity of any of the proceedings in said action hereinbefore described; and directing the District Court of the United States for the Southern District of New York, sitting at common law to show cause why in the alternative a Writ of Certiorari should not issue from this Honorable Court directing said District Court of the United States sitting at common law to send up to this Honorable Court all the proceedings in said action hereinbefore set forth; and why your petitioner should not have such other and further relief in the premises as may be just and meet; and your petitioner further prays that said writs may issue accordingly, and your petitioner will every pray, &c.

ANNIE S. SIMONS, Petitioner,
By ROGER FOSTER,
Attorney for Petitioner,
55 Liberty Street,
Borough of Manhattan,
New York City.

ROGER FOSTER,
of Counsel.

State of New York, ss.:

ROGER FOSTER, being duly sworn, deposes and says: I am the attorney and counsel for the above named petitioner. The statements in the foregoing petition are true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true. The reason why this petition is not sworn to by the petitioner is that said petitioner resides in the City of Charleston, and State of South Carolina, and is not within the State of New York, in which this deponent resides.

Sworn to before me this
1 day of October, 1917.

ROGER FOSTER

GERTRUDE GIBBONS
Comm. of Deeds, City of N. Y., Res. Brooklyn
Cert. filed N. Y. Co. Cl. 136
N. Y. Reg. 18053. Term May 2nd 1919.

Exhibit A.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK,

ANNIE S. SIMONS,
Plaintiff,

vs.

WILLIAM NELSON CROMWELL, described in the Summons as Thomas Nelson Cromwell, and LOUIS H. CRAMER, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

The plaintiff above named, by Roger Foster, her attorney, respectfully shows to the Court:

I. The plaintiff is and at all the times hereinafter mentioned and at the time of the commencement of this action was a citizen and resident of the City of Charleston in the State of South Carolina.

II. The defendant Cromwell above named, is and at all the times hereinafter mentioned, and at the time of the commencement of this action, was a citizen and resident of the Borough of Manhattan, City, County and State of New York.

The defendant Cramer is and at all the times hereinafter mentioned and at the time of the commencement of this action was a citizen and resident

of Saratoga Springs, in the County of Saratoga, State of New York.

III. On or about the 17th day of September, 1914, the above named Frank Leslie, who was a woman, a widow and childless, died in the City and County of New York of which she was a resident. She is hereinafter described as Mrs. Leslie. On or about December 7th, 1914, the will of said Mrs. Leslie was admitted to probate by one of the Surrogates of the County of New York. The said Last Will and Testament appointed as executors of the said Mrs. Leslie the above named defendants. On or about said last named date, letters testamentary under said Will and Testament were duly issued to the said defendants out of the Surrogates' Court of the County of New York and the said defendants duly accepted the same and qualified as such.

IV. The above named plaintiff is the cousin german of said Mrs. Leslie. The father of the plaintiff was the brother of the father of said Mrs. Leslie.

V. For thirty years or more prior to her death, the said Mrs. Leslie knew only one other relative, a niece, as long as and as intimately as the plaintiff.

VI. At different times between the year 1899 and the year 1913 both inclusive, at the request of said Mrs. Leslie, this plaintiff acted as nurse and companion for the said Mrs. Leslie in the States of New York, New Jersey, and South Carolina, and on different journeys. The said services were laborious, painful and humiliating. The said services were performed at the following places and during approximately the following times, as well as at other

times and places: During the months of October, November and December, 1889, at Sherry's Hotel, New York City. At that time and place this plaintiff nursed the said Mrs. Leslie, at the latter's request, through a severe illness of the said Mrs. Leslie. During said time this plaintiff, at the request of Mrs. Leslie occupied the same bed with Mrs. Leslie, frequently bathed Mrs. Leslie and changed Mrs. Leslie's garments and suffered greatly through the loss of sleep because of the attention that she thus paid Mrs. Leslie. During said time she took her meals in the bedroom of Mrs. Leslie and she never left Mrs. Leslie's room except occasionally for a short drive when the weather permitted. Plaintiff consequently was unable to return to her in Charleston, South Carolina, in time for Christmas and plaintiff was thus prevented from spending Christmas with plaintiff's aunt who had had charge of plaintiff during plaintiff's childhood and during said period of time from taking care of plaintiff's aunt who was then eighty years of age and blind, and with whom plaintiff had been accustomed to spend Christmas each year and to whom plaintiff had been for many years accustomed to give great care and attention. This neglect of plaintiff's aunt who died a few months later was necessitated by the said services performed by plaintiff for the said Mrs. Leslie at Mrs. Leslie's request and was a cause of great grief to plaintiff.

VII. Immediately after a stroke of paralysis from which the said Mrs. Leslie had suffered, during the months of February, March and April, 1902, at the Chelsea Hotel in the City of New York, and in the City of Charleston, South Carolina, and on a journey from New York City to South

Carolina, the plaintiff, at Mrs. Leslie's request, nursed Mrs. Leslie and took the place of a trained nurse who was discharged upon the arrival of the plaintiff in New York. During this period of time Mrs. Leslie could not without assistance walk nor could she dress nor undress herself without aid, which aid and assistance was given Mrs. Leslie by plaintiff, at Mrs. Leslie's request. Mrs. Leslie requested and insisted that this plaintiff should remain within her call by day and by night since Mrs. Leslie was in constant fear of another stroke of paralysis, and plaintiff so remained.

VIII. During the winters of the years 1903 and 1904 the said plaintiff at the request of Mrs. Leslie acted as constant nurse and companion for Mrs. Leslie at Charlston, South Carolina.

During the late summer and early fall of 1904, 1905, 1906, 1907, 1908, 1909 and 1913, in the City of New York, this plaintiff at the request of Mrs. Leslie acted as companion for Mrs. Leslie at the Chelsea Hotel and subsequently at the Sherman Square Hotel for a period of time, the exact amount of which is now unknown to plaintiff.

During the summer and early Autumn of 1913 this plaintiff acted as nurse and companion for Mrs. Leslie at Hampton Park Terrace, in Cramford, New Jersey and in the Sherman Square Hotel in the City of New York.

During two years which upon information and belief were the years 1905 and 1906 this plaintiff spent approximately two months in the winter of each of said years in the City of New York as companion and nurse for Mrs. Leslie at Mrs. Leslie's request. During all of these times that plain-

tiff was acting as nurse and companion for Mrs. Leslie she was, at Mrs. Leslie's request acting as maid for a dog of Mrs. Leslie, whose disposition was spoiled and to whom Mrs. Leslie insisted and requested that great care and attention should be given by plaintiff as was done by plaintiff who took said dog out of the hotel where Mrs. Leslie lived for said dog's exercise and that the dog might obey the calls of nature. On one occasion in the Fall of 1913, plaintiff was subjected to abuse from Mrs. Leslie because plaintiff refused to take the said dog out for exercise on Broadway at night, while dressed only in a kimona, as directed so to do by Mrs. Leslie, and finally to appease the anger of Mrs. Leslie plaintiff put on a raincoat, and so dressed went out on Broadway with the said dog.

IX. The said Mrs. Leslie at the time of her death was seventy-eight years of age. During all said times, Mrs. Leslie was feeble in body and suffered from a complication of diseases and was in consequence thereof, in a highly irritable and nervous condition. She was then arbitrary and dominant; accustomed to exact strict compliance with her wishes by this plaintiff and by everyone who came in contact with her and she was a very difficult person to get along with. Her physical and mental condition was such that she had need of a nurse and companion of her own sex and her own class. She was unable to keep in her service as a companion or as a nurse people of ordinary circumstances upon ordinary terms for any length of time because of the lack of consideration with which she treated them and the duties which she insisted upon their performing. She

was unwilling to treat and did not treat with courtesy or consideration those dependent upon her. She was then penurious in disposition and unwilling to pay during her life adequate compensation for services of that nature. Upon information and belief; she was accustomed to obtain the services of men and women, (even of hotel bell boys and porters) without paying them any compensation, upon her promise to compensate them by legacies in her will. Her estate was large, approximating in value $1,800,000.

Her nature and disposition were so irascible that she became frequently involved in quarrels and misunderstandings and antagonisms with many with whom she had business and social and personal relations. This subjected plaintiff to many difficulties and humiliations. For example, on one occasion Mrs. Leslie was ordered out of a dining car because she insisted in feeding her dog at the table, thus violating the rules of the car. Plaintiff was obliged to leave the car with Mrs. Leslie in the presence of a number of people and afterwards to return to the car and obtain food which she carried thence to Mrs. Leslie and her dog in the car in which Mrs. Leslie had a seat.

The said Mrs. Leslie was at all of the times herein mentioned of a very penurious disposition. For example in September 1913 she forbade this plaintiff to take cream with her coffee at breakfast at the Sherman Square Hotel because there was an additional charge of ten cents for the service of cream. She often loudly complained at the hotel dining rooms that the plaintiff ate too much, which was not the case. Mrs. Leslie obliged this plaintiff to live at hotels in a manner not fit and

at a scale much below that to which this plaintiff was accustomed. For example, the room furnished this plaintiff at the Chelsea Hotel was small, dark, improperly ventilated and not intended for the purposes of a bedroom, and injurious to health. The heat in said room was at times so intense as to cause plaintiff to have vertigo and bleeding from the nose. The room furnished plaintiff at the Sherman Square Hotel was of a like nature. Plaintiff was not permitted to have any light in her room at night. The bed furnished plaintiff was a cot, and plaintiff frequently had to supply her own bed linen and towels because of Mrs. Leslie's failure to provide a proper and sufficient supply and change of same. The room, bed, and bath used by plaintiff at the Sherman Square Hotel had been used by a companion of Mrs. Leslie who had suffered with, and died of cancer while acting as a companion for Mrs. Leslie. Mrs. Leslie interfered with the personal life of this plaintiff. She insisted that this plaintiff should dress so as to please the said Mrs. Leslie. This resulted in much discomfort and mortification to this plaintiff. For example, on one occasion in or about the month of September 1913 plaintiff was obliged to attend a luncheon in a silk petticoat because said Mrs. Leslie objected to the plaintiff's wearing any of the dresses which were then in plaintiff's possession.

X. In consideration of the performances of the said services by plaintiff as aforesaid and of plaintiff's continuance in the performance of the same said Mrs. Leslie promises to bequeath to this plaintiff by her last will and testament a legacy of the sum of $50,000. Said promise was made in or about

the month of February 1902 and was repeated on subsequent occasions. In consideration of said promise the services hereinbefore set forth were performed by plaintiff.

XI. The said will of said Mrs. Leslie left this plaintiff no more than the sum of $10,000.

XII. By the action of the said Mrs. Leslie as aforesaid this plaintiff has been damaged in the sum of $40,000 with interest from September 17th, 1915.

WHEREFORE this plaintiff prays judgment against defendants for the sum of Forty Thousand ($40,000) dollars with interest from September 17th, 1917 and for such other and further relief in the premises as may be just together with the costs of this action.

AND this plaintiff alleges as a second distinct and separate cause of action:

XIII. She repeats and refers to the previous allegations herein designated by the paragraph numbers I, II, III, IV, V, VI, VII, VIII and IX and she incorporates the same in this complaint with the same effect as if the same were repeated herein specifically and at length.

XIV. Said Mrs. Leslie promised to pay to this plaintiff the reasonable value for said services.

XV. The reasonable value of said services was the sum of Fifty thousand ($50,000) Dollars.

XVI. Mrs. Leslie has not paid this plaintiff any part of the same except the sum of Ten Thousand ($10,000) Dollars which said Mrs. Leslie bequeathed this plaintiff by her will.

XVII. By the action of Mrs. Leslie as aforesaid, this plaintiff has been damaged in the sum of Forty Thousand ($40,000) Dollars with interest from September 17th, 1915.

WHEREFORE plaintiff demands judgment against defendants for the sum of $40,000 with interest as aforesaid and for such other and further relief in the premises as may be just together with the costs of this action.

ROGER FOSTER,
Attorney for Plaintiff,
55 Liberty Street,
Manhattan, New York.

State of South Carolina,
County of Charleston, } ss.:

ANNIE S. SIMONS, being duly sworn, deposes and says: I am the plaintiff above named. The foregoing complaint is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe the same to be true.

ANNIE S. SIMONS.

Sworn to before me this
13th day of June, 1917.

(Notarial Seal) Wm. Henry Parker,
Not. Pub. S. C.

Exhibit B.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the Summons as Thomas Nelson Cromwell, and Louis H. Cramer, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

The defendant Louis H. Cramer, executors, by Edgar T. Brackett, his attorney, answer the complaint herein as follows:

1st. Said defendant admits the allegations contained in the paragraphs of said complaint numbered II, III, IV and XI.

2nd. Said defendant denies all of the allegations in the paragraphs of said complaint numbered XII, XV and XVII.

3rd. Said defendant denies that he has any knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained, except as to those hereinbefore specifically admitted or controverted.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION:

4th. The said defendant avers that, excluding from the computation of the time which has elapsed since the accruing of the first alleged cause of action set forth in the complaint herein, the period of eighteen months which have elapsed since the death of the said Frank Leslie, the said alleged cause of action did not accrue within six years next before the commencement of this action.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION:

5th. Said defendant avers that the alleged agreement, by its terms, was not to be performed within one year from the making thereof. That no such agreement, or any note or memorandum thereof, was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent.

FOR A FOURTH, SEPARATE AND PARTIAL DEFENSE TO THE SECOND CAUSE OF ACTION:

6th. Said defendant alleges that as to all services alleged in said second cause of action to have been rendered prior to November 16, 1909, the said cause of action therefor did not accrue within the six years just prior to the commencement of said action, after excluding from the computation of time the period of eighteen months which elapsed immediately after the death of the said Frank Leslie.

WHEREFORE, defendant Cramer prays that the complaint be dismissed with costs.

EDGAR T. BRACKETT,
Attorney for Defendant Cramer,
Town Hall,
Saratoga Springs, N. Y.

State of New York,
County of Saratoga, } ss.:

Louis H. Cramer, being duly sworn, says that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LOUIS H. CRAMER.

Subscribed and sworn to before
me this 17th day of June, 1917.

HIRAM C. TODD,
Notary Public.

Exhibit C.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the summons as "Thomas" Nelson Cromwell and LOUIS H. CRAMER, as Executors under the Last Will and Testament of FRANK LESLIE, Deceased,
Defendants.

The defendant, William Nelson Cromwell, as Executor, by Sullivan & Cromwell, his attorneys, answers the complaint herein as follows:

FIRST.—Said defendant admits the allegations contained in paragraphs numbered II and III of said complaint.

SECOND.—Said defendant denies on information and belief each and every allegation in the paragraphs numbered XV and XVII of said complaint.

THIRD.—Said defendant denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in said complaint except as to those allegations herein expressly admitted or denied.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

FOURTH.—Said defendant avers that, excluding from the computation of the time which has elapsed since the accruing of the first alleged cause of action, set forth in the complaint herein (if such ever accrued), the period of eighteen months which has elapsed since the death of the said Frank Leslie, the said alleged cause of action did not accrue within six (6) years next before the commencement of this action.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

FIFTH.—Said defendant avers, on information and belief, that the agreement alleged in paragraph numbered X of the complaint herein, if such agreement was in fact entered into, was, by its terms, not to be performed within one (1) year from the making thereof; that neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent.

FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

SIXTH.—Said defendant avers, on information and behalf, that the agreement alleged in paragraph numbered X of the complaint herein, if such

agreement was in fact entered into, was for the sale of goods, chattels or things, in action for the price of Fifty Dollars ($50) or more; that neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent; nor did the said Annie S. Simons, at the time of the alleged agreement, accept or receive any part of such goods; nor did the said Annie S. Simons, at the time, pay any part of the purchase price.

FOR A SECOND, SEPARATE AND PARTIAL DEFENSE TO THE SECOND CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

SIXTH.—Said defendant avers that as to all services alleged in said second cause of action, to have been rendered prior to December 14, 1909, the said alleged cause of action therefor did not accrue within six (6) years next before the commencement of this action, after excluding from the computation of the time which has elapsed since the accruing of said alleged cause of action, the period of eighteen (18) months which has elapsed since the death of the said Frank Leslie.

WHEREFORE, the defendant Cromwell asks that the complaint herein be dismissed with costs.

SULLIVAN & CROMWELL,
Attorneys for Defendant Cromwell,
as Executor,
49 Wall Street,
New York, N. Y.

State of New York,
County of New York, } ss.:

Clarke M. Rosecrants, being duly sworn, deposes and says; that he is a member of the firm of Sullivan & Cromwell, attorneys for the defendant William Nelson Cromwell in the above entitled action, and resides at Hotel Plaza, in the City, County and State of New York, and has his office at 49 Wall Street, in the City, County and State of New York; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further states that the reason why this verification is not made by said defendant, is that said defendant is not within the said County of New York, but is at Paris, France.

Deponent further says that the grounds of deponent's behalf are as follows: that he has a general knowledge of the value of services of the kind and nature set forth in the second cause of action of the complaint herein; that he is familiar with the affairs of the estate of Frank Leslie, deceased, and has examined the effects and papers of said decedent, and has failed to find among them any memorandum, writing or note evidencing any agree-

ment of the kind and nature set forth in the first cause of action in the complaint herein.

CLARKE M. ROSECRANTZ.

Sworn to before me this
5th day of July, 1917.

WALTER J. STEWART,
Notary Public,
Richmond Co.,
N. Y. No. 68.

Certificate filed N. Y. Co.
County Clerk's No. 55.
Register No. 9165.

18

No. 26 Orig

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IN THE

Supreme Court of the United States

IN THE MATTER
of
The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

BRIEF IN SUPPORT OF PETITION.

ROGER FOSTER,
Counsel for Petitioner,
55 Liberty Street,
Borough of Manhattan,
New York City.

IN THE

Supreme Court of the United States

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The Application of ANNIE S. SIMONS, for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or in the alternative for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity, or in the alternative for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

BRIEF IN SUPPORT OF PETITION.

Statement.

This is an appeal to set aside an order of Judge Hough sitting in the District Court, which directs

that the first cause of action set forth in the complaint at common law be stricken out and that this cause of action be transferred to the Court when sitting in equity. The order and the memorandum of Judge Hough upon the subject are set forth in full in the petition. The mischief to the petitioner, who is the plaintiff below, that will result from such an order, is also indicated therein. The plaintiff has been denied her constitutional right to a trial by jury upon the issues raised upon the first cause of action. It will be contended that the proceeding of the petitioner in equity amounts to a waiver of her right subsequently to review this order of severance. The decree in equity can only be reviewed by an appeal. The judgment at common law can only be reviewed by a writ of error. The proceedings upon the two causes of action will be placed upon two separate dockets in two separate records. There are serious if not fatal obstacles against bringing up the order of severance in both of such separate proceedings for review. If it is to be treated as a part of the record at common law it cannot be brought up upon an appeal in equity. If it is part of the record in equity it cannot be brought up by a writ of error addressed to the District Court sitting at common law. If the order is not set aside, the record will be complicated and the time of the District Court needlessly occupied by two distinct trials, one at common law and one in equity, and the time of this Court or of the Circuit Court of Appeals as the case may be, will be needlessly occupied by two distinct proceedings for review, one at common law and the other in equity in each of which the plaintiff seeks the same relief. Moreover, the order is beyond the power and beyond the jurisdiction of the District Court.

The complaint which is annexed to the petition shows the following facts: The plaintiff is one of the next of kin of Mrs. Leslie, being her cousin-german. She performed certain services as nurse and companion for Mrs Leslie at different times during a period of fourteen years in the States of New York, New Jersey, South Carolina and on different journeys. The services which are specified in detail in the complaint were laborious, disagreeable and humiliating in the extreme. She performed these at the request of Mrs. Leslie who promised her that in return for them she would bequeath plaintiff a legacy of $50,000. The will of Mrs. Leslie bequeathed the plaintiff only $10,000. The estate of Mrs. Leslie "was over a million dollars in value" (par. IX). By the action of Mrs. Leslie as aforesaid plantiff has been damaged in the sum of $40,000. The complaint asks no specific performance of any act, contractual or otherwise, but merely a judgment for damages.

I.

The petitioner has the right to one of the extraordinary writs which she seeks.

(a) *The writ of mandamus should issue.*

As the result of the numerous decisions concerning the right to the writ of mandamus to this Court we have deduced the following rule:

This writ will not issue in an ordinary case to correct errors made by a judge in the exercise of his jurisdiction. Whenever a constitutional right has been denied, or a judge has acted clearly beyond

his jurisdiction, and there is no immediate remedy by a writ of error or appeal, the extraordinary writ of mandamus will issue to correct an error which if left uncorrected will cause confusion and complications so great that serious inconvenience to the Courts, and to the litigants will therefrom result. (*Virginia* vs. *Rives*, 100 U. S., 313, 323, 329; *Virginia* vs. *Paul*, 148 U. S., 107; *Kentucky* vs. *Powers*, 201 U. S., 1; *Ex parte Metropolitan Water Company*, 220 U. S., 539, 540, 546; *Brown* vs. *Circuit Judge of Kalamazoo County*, 75 Mich., 274, 58 L. R. A., 226, 228, 230.)

In granting the order of severance, the Judge and the Court below acted beyond their jurisdiction, and inasmuch as the Statute gives no right to review such an order by writ of error, the writ of mandamus should issue.

In *Ex parte Metropolitan Water Company of West Virginia*, 220 U. S., 539, 545, 546, the writ of Mandamus was granted to set aside an order of a District Judge vacating a temporary restraining order against an officer of the State in the enforcement of a statute and denying a motion for a temporary injunction against such enforcement. The Chief Justice of the United States said: "Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction. It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge acted without jurisdic-

tion, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it 'necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right to appeal is not otherwise given by statute. *Ex parte Harding*, 219 U. S., 363.'" The order there reviewed by mandamus might have been subsequently reviewed by an appeal from the final decree.

The following decision is on all fours with the case at bar except that there, conversely, the issues of fact had been sent to a jury for decision instead of being tried by the Judge below.

BROWN vs. CIRCUIT JUDGE OF KALAMAZOO COUNTY, 75 Mich., 274, 58 L. R. A., 226. 228, 230. *Held*, that where a judge in a case which was only cognizable in equity had directed a trial by jury and entered judgment upon the verdict, considering himself bound thereby "and refused to exercise his own judgment in the case"; a mandamus should issue requiring him to hear the case and himself decide the same. The judge there had acted in obedience to a statute which upon the application for the extraordinary writ was held to be unconstitutional. In that State, suits at law and in equity were triable by the same court in the same manner as in the courts of the United States. Campbell, J.: "As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in our essentials the classification of legal and equitable rights as involving the necessity of

separate administration in important particulars.

"The Constitution of the United States recognizes the division of ordinary civil jurisprudence with cases at law and cases in equity, and it has been held by the Supreme Court of the United States that this recognition puts it beyond the power of Congress to make any serious change in that classification."

It is well settled that the writ of mandamus is the proper remedy to prevent the enforcement of an order for a change of venue made by a court having exclusive jurisdiction to hear and determine the proceeding, and with no power to send away the case for trial elsewhere; and that an appeal from the final judgment rendered by the court to which the venue is changed does not afford an adequate remedy.

State of Washington ex rel. Wyman, Partridge & Company vs. *Spokane County*, Superior Court, Wash. Oct. 31, 1915, 82 Pac., 875, Rudkin, J.: "At the threshold of the proceeding the respondent raises the objection that the relator has an adequate remedy by appeal, and that mandamus will not lie. If the contention of the relator is correct, *viz.*, that the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings without power or discretion to order a change of venue, mandamus is the proper remedy. The mere fact that the superior court of Kittitas county, to which the proceedings have been transferred, may erroneously assume jurisdiction, and that the proceedings may in that way eventually reach this court by appeal, is not, in our opinion, an adequate remedy." To the same effect are: *Ex parte Cox*, 10 Mo. 742; *State ex rel Harris* vs. *Loughlin*, 75 Mo.

358; *State ex rel Schonhoff* vs. *O'Bryan*, 102 Mo. 254, 14 S. W. 933.

In every case apparently to this authority that may be cited, the Court of original jurisdiction had power to order a change of venue but it was argued that such change was improperly ordered.

The effect of the order of severance is to grant a perpetual stay of proceedings to enforce the first cause of action at common law and to enjoin the further prosecution thereof at common law.

It is well settled that the Writ of Mandamus will issue to compel a Court to proceed in a suit which it has improperly stayed. (*Livingston* vs. *Dorgenois*, 7 Cranch 577, 3 L. ed. 444; *Barber Asphalt Pav. Co.* vs. *Morris*, C. C. A. 67 L. R. A. 761, 132 Fed. R. 945; *McClellan* vs. *Carland*, 217 U. S. 268, 54 L. ed. 762.)

It will also issue to compel a Court to proceed to judgment. (*Life & Fire Ins. Co.* vs. *Wilson*, 8 Pet. 291, 8 L. ed. 949; *Life & Fire Ins. Co.* vs. *Adams*, 9 Pet. 571, 9 L. ed. 233. *Ex parte Equitable Trust Company*, C. C. A. 9th Ct. 231 Fed. R. 571, 585, 594; In re *Watts*, C. C. A. 2nd Ct. 214 Fed. R. 80.

The Writ has been granted to compel a Court to enforce its judgment. (*Ex parte United States*, 242 U. S. 27.)

The Writ has been issued: to compel a Judge to permit documents on file in the clerk's office under seal to be produced, opened and put in evidence *Ex parte Upperou*, 239 U. S., 435: to compel a Court to overrule an objection to a Master's summons which required the defendant to render a sworn statement of an account in accordance with Equity Rule 79. (*In re Beckwith*, C. C. A. 7th Ct. 203 Fed. R. 45; S. C. C. C. A. 201 Fed. R. 518.)

It has been held that the Writ may be issued to

set aside an order of a District Court which modified a decree rendered at a previous term, although no appeal or writ of error was then pending or had been previously issued or taken. (*Re Dennett*, C. C. A. 9th Ct. 215 Fed. 673; see also *New Liverpool Salt Co.* vs. *Wellborn*, C. C. A. 9th Ct. 160 Fed. 923.)

The writ will issue to set aside an order disbarring an attorney which had been rendered without jurisdiction or after a proceeding in which the Court below had acted with flagrant impropriety. *Ex parte Bradley*, 7 Wallace 364; *Ex parte Robinson*, 19 Wallace, 506. See also *Ex parte Wisner*, 203 U. S. 449; *In re Winn*, 213 U. S. 458; *Virginia* vs. *Rives*, 100 U. S. 313; see *Virginia* vs. *Paul*, 148 U. S. 107.

(b) *If the writ of Mandamus will not lie, a writ of Prohibition should be granted.*

It is well settled that this court has power to grant the writ of prohibition in cases other than those arising in admiralty where the District Court has exceeded its jurisdiction. (*United States* vs. *Mayer*, 235 U. S. 55.)

In *ex parte Indiana Transportation Co.*, 244 U. S. 456, the writ was granted to prevent the filing of an amended pleading against a non-resident who had appeared in a suit so as to charge him with liability to a number of new litigants who had not served him with process within the jurisdiction.

In *ex parte Equitable Trust Co.*, C. C. A. 9th Ct. 231 Fed. 571, 594, the writ of prohibition was granted to set aside an order in a suit for the foreclosure of a railroad mortgage which required strangers to the suit to become parties and to interplead. These strangers were the parties to a col-

lateral agreement providing for payments to the mortgagor.

In *Lehman* vs. *Gumbel*, 236 U. S. 448, it was held that the writ was properly granted to prevent a State Court from proceeding to enforce a vendor's lien through garnishee process levied within four months prior to a petition in bankruptcy. There the proceedings had not terminated and had not ripened into final judgment in the Court of original jurisdiction. After such final judgment, they might have been reviewed by a writ of error. Notwithstanding this, the issue of a writ of prohibition was held to be the appropriate remedy.

(c) *If neither of the foregoing writs can be obtained, the petitioner has the right to a writ of Certiorari.*

This is not the statutory writ of certiorari but the original writ issuable at common law which under its supervisory jurisdiction is vested in this Court, by §262 of the Judicial Code, formerly §716 of the Revised Statutes.

In *United States* vs. *Beatty*, 232 U. S., 463, 467, this Court said, speaking of this writ: "We do not overlook §262 of the Judicial Code, formerly §716 of the Revised Statutes, which empowers this Court to issue all writs, not specifically provided for by Statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. No doubt, this provision contemplates the employment of the writ of certiorari in instances not covered by §240 and affords ample authority for using the writ as an auxiliary process and, whatever there is imperative necessity therefor, as a means of correcting excesses of jur-

isdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways. *American Construction Co.* vs. *Jacksonville Co.*, 148 U. S., 372, 380; In re *Chetwood*, 165 U. S., 443; *Whitney* vs. *Dick*, 202 U. S., 132; *McClellan* vs. *Carland*, 217 U. S., 268."

(*d*) *A District Court of the United States, when sitting in equity and when sitting at common law, exercises as independent a jurisdiction and in the contemplation of the law constitutes two distinct courts just as much as when it is a Court of Admiralty and a Court of Bankruptcy.*

That the District Court of the United States when sitting in admiralty and when sitting in bankruptcy are two distinct courts is universally admitted. Section 24 of the Judicial Code is a re-enactment in the same words of the former Statutes upon the subject which are there consolidated. This uses the same language concerning the jurisdiction in admiralty and in bankruptcy. It gives the District Courts original jurisdiction "of all suits of a civil nature, at common law or in equity * * * of all civil causes of admiralty and maritime jurisdiction * * * of all matters and proceedings in bankruptcy," &c.

(*e*) The petitioner has no less right to one of the extraordinary writs, than if she had sued upon a single cause of action, and that had been sent from the common law court to the court of equity. It is settled that when one of two separate and different causes of action joined together in a single pleading has been dismissed, such dismissal may be reviewed without awaiting the termination of the issues raised upon the other cause of action. *Scriven* vs. *North*, C. C. A., 4th Ct., 134 Fed. R., 366; *Historical Pub. Co.* vs. *Jones Bros. Pub. Co.*,

C. C. A., 3rd Ct., 231 Fed. R., 784; *Miocene Ditch Co.* vs. *Moore*, C. C. A., 9th Ct., 150 Fed. R., 483, 493; *Hill* vs. *Chicago Evanston, R. R. Co.*, 140 U. S., 52, 35 L. ed., 331.

Miocene Ditch Co. vs. *Moore*, C. C. A., 9th Ct., 150 Fed., 483, 493, per Ross, J., "The order vacating and setting aside the decree, the findings, conclusions of law, the amendment to the complaint, and the other pleadings relating thereto, upon which the decree was based, was certainly a final disposition of the rights of the appellant with respect to the waters brought into the suit by the amended pleadings, and was therefore appealable."

II.

The District Court had no power to make such an order as was made below.

(*a*) No statutory provision nor any equity or common law rule gives such authority, although under Equity Rule 22 a motion may be made to send a cause from the equity to the common law calendar. The object of this rule is to protect the constitutional right. No constitutional right is infringed by the trial of a case before a jury which might have been tried in equity.

(*b*) §274a of the *Judicial Code* (38 St. at L. 956) merely authorizes amendments. That section which was added by the Act of March 3, 1915, c 90 (38 St. at L. 956), is as follows:

> "That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been

brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

This Statute does not authorize a transfer in any case.

That a motion for a transfer cannot be made has been expressly held by the Circuit Court of Appeals for the Sixth Circuit in *Waldo* vs. *Wilson*, C. C. A., 231 Fed., 654, 656: where the Court also said of §374a: "This section relates only to the power of the court in a case where a suit has been improperly brought, either on the equity or the law side of the court, and provides that the same be amended so as to have the pleadings conform to the proper practice."

(*c*) It does not authorize a severance.

(*d*) It was clearly not its intention to warrant a transfer upon compulsion against the wish of the plaintiff. The phrase "any party to the suit shall have the right * * * to amend" &c., shows that it was the intention to give a right to the plaintiff, not to compel him against his will to proceed upon a different side of the court from that which he had elected. If the plaintiff has selected a wrong side of the court upon which to proceed,

the penalty upon him is not to compel him to go to the other side which he does not wish to enter; but to dismiss his suit at the appropriate time in the cause.

(*c*) Moreover, the statute does not purport to justify a transfer of part of a suit.

The Constitution which in Article III, Section 2 expressly recognizes the distinction between "cases in law and equity" as well as the Seventh Amendment which guarantees the right of trial by jury, forbids such a transfer of part and of the whole of a cause of action from law to equity, especially when the plaintiff claims the right to a trial by jury.

(*Parsons* vs. *Bedford*, 3 Pet., 433, 7 L. ed., 732; *Bennett* vs. *Butterworth*, 11 How., 669, 674, 13 L. ed., 859, 861; *Hipp* vs. *Babin*, 19 How., 271, at page 277, 15 L. ed., 633, 634; *Fenn* vs. *Holme*, 21 How., 481, 486; *Costs in Civil Cases*, 1 Blatchf. C. C., 652, 654; *Butler* vs. *Young*, 1 Flip., 276, 278; *Meade* vs. *Beale*, Taney, 339, at page 361; *Thompson* vs. *Railroad Co's*, 6 Wall., 134, 18 L. ed., 765; *Reubens* vs. *Joel*, 13 N. Y., 488, p. 497.)

The constitutional right to trial by jury involves that, after the issues have been joined, to have them determined upon a jury trial upon which any defects in the complaint will be obviated by evidence in plaintiff's favor elicited from the defendant, and the Judge has the right to grant such amendments as may be appropriate. See *Slocum* vs. *New York Life Ins. Co.*, 228 U. S., 364.

III.

By answering without taking the objection the defendants waived the objection that the first cause of action should have been brought in equity.

It is well settled that when a suit is brought in equity the objection that the plaintiff has an adequate remedy at law is waived by the defendant, unless raised in a demurrer, plea or answer.

(*Reynes* vs. *Dumont*, 130 U. S., 354, 32 L. ed., 934; *Kilburn* vs. *Sunderland*, 130 U. S., 505, 32 L. ed., 1005; *Brown* vs. *Lake Sup. I. Co.*, 134 U. S., 530, 33 L. ed., 1021.)

The right to a trial by jury which is guaranteed by the Constitution is more sacred than the right to avoid a trial by jury. Consequently any state of facts which are sufficiently strong to constitute a waiver of the former must amount to a waiver of the latter.

IV.

The complaint sets forth two causes of action, each of which is cognizable at common law.

The second count, which is upon a quantum meruit, the defendants conceded to be maintainable at common law. The first cause of action is exactly like the second except that it alleges a promise to pay for the services the sum of $50,000 and a breach of that promise and the consequent damages. A judgment for damages is al-

ways cognizable at common law. The cases upon which the defendants relied belong to two classes. They were attempts to enforce either an agreement to devise by will an interest in land or an agreement to leave by will all the property of the testator both real and personal. In the first class of cases the land could not be recovered at common law since there was no contract in writing to convey the same. The plaintiff consequently was obliged to apply for the usual equitable relief when an oral contract to convey land has been partly performed. Such relief could only be had in equity. In the second class of cases the agreement has at times been held to be void as against public policy. *Gall* vs. *Gall*, 64 Hun (N. Y.), 597. Moreover, in such cases an accounting is involved in the ascertainment of the amount to which such a plaintiff is entitled.

The English Statute of Wills, 32 Hen. VIII, c. 1, Hen. VIII, c. 5, quoted in 2 Blackstone 375, and the Statute of Frauds, 29 Car. II, c. 3, both apply only to contracts to convey real estate or interests therein. Neither of them nor any provision in the statutes of the State of New York or of South Carolina requires a written contract for the conveyance of personal property or a contract in relation to the same to be in writing, except a sale of goods or one which by its terms is not to be performed within a year.

The statute of frauds forbidding a conveyance of an interest in lands except in writing does not apply to a promise to pay a sum of money either immediately or through a bequest in a last will and testament.

Bell vs. *Hewitt's Ex'rs*, 241 Md., 280, quoted *infra*.

There is no rule of public policy which prevents the enforcement of such an agreement as is set forth in the complaint. Consequently it is not surprising that the learned counsel for the defendants have failed to find a single case holding that a suit to obtain damages for failure to perform such a promise is not cognizable at common law.

Redfield on Wills, Part II, Vol. II, pages 281, 282: "Aside from any question of the statute of frauds, there can be no doubt a court of equity, or even a court of law will allow compensation to a party who has advanced money, or performed valuable services in faith of a legacy," &c. That such an action can be maintainable at common law has been held for more than three hundred years, since the reign of James First.

Silvester's Case, Popham 148, 2 Roll 104, 79 *Eng. Reps.,* 1248; "John Silvester promised to John B. that if he would marry his daughter, that he would give with her a child's part, and that at the time of his death he would give to her as much as to any of his children, excepting his eldest son, and afterwards he made his executors and died: J. B. brought an action upon the case against the executors upon his promise, and showed that the executors had not given him a child's part, and that such a younger son of the testator's had an 100*l* given him; and it was resolved by the Court that the promise of a child's part is altogether uncertain, but being so much as any of his children had, and then showing that the younger son had an 100*l* this was certain enough, and thereupon judgment was given for the plaintiff."

Such a contract was enforced by Lord Mansfield in *Fenton* vs. *Emblers,* 3 Burr. 1279. There the testator had promised orally to his housekeeper, in

consideration for her taking upon herself the care and management of his family, &c., "to pay wages to the said Sarah at and after the rate of six pounds for one year; and also by his Last Will and Testament to give and bequeath to the said Sarah a legacy or annuity of sixteen pounds by the year to be paid and payable to her yearly and after a year from the day of the decease of the said William for and during the term of her natural life." Lord Mansfield said: "There is nothing in the objection about his leaving it by his will; for, there is nothing testamentary in a promise to leave at his death."

The same rule has been applied in the Federal Courts.

In *Gunter* vs. *Gunter*, C. C. A. 174 Fed. 933, 935, an action was sustained at common law when brought to enforce a promise by which "Job Gunter then agreed that for the consideration aforesaid he would execute a will in favor of Nat Gunter whereby he would devise and bequeath to Nat Gunter the sum of $50,000," &c.

In *Miller* vs. *Steele*, C. C. A. 153 Fed. 714, 718, 720, an action at common law was sustained against a residuary legatee to collect damages because of the breach by the testator of an oral promise to pay the plaintiff the sum of $25000 for services as a nurse. The Court said, pages 718, 719: "It is urged that the case of the plaintiff as stated in her petition was not cognizable at law, but was one exclusively of equity jurisdiction. * * * In the present case the judgment sought was one for a sum of money, which would be simply given or denied, according to the finding upon the issues. The proof would be the same in either court, whether of law or equity. No discovery was sought nor was there any accounting required. It was

not a case for contribution among defendants; * * * the mere fact that equity has jurisdiction of trusts, and that the fund sought to be reached is in the nature of a trust fund, does not of itself make it necessary to resort to a court of equity when the law affords a full, adequate, and complete remedy. That rule extends over all classes of cases, when the condition stated exists. If, in a case involving a trust, there is a necessity for the employment of the functions of a court of equity, such as, for an accounting, or for the marshaling of assets or for contribution of proportions by several defendants, or a conditional judgment must be made, or some personal act of the defendant is required, then a resort to that court should be had; but, *where there is simply an obligation to pay a sum of money, there can be objection to a suit at law for its recovery, notwithstanding it may have become due in consequence of trust relations* * * *.

"We are therefore of the opinion that the objection to the jurisdiction of the case, because it was an action at law was properly overruled." Approved *Warmath* vs. *O'Daniel*, C. C. A., 159 Fed., 87.

Warden vs. *Hinds*, C. C. A., 4th Ct., 163 Fed., 201, 205: "All the authorities agree that one may, for a valuable consideration, and in some instances a good consideration, renounce the absolute power to dispose of his estate at pleasure, and bind himself by a contract to dispose of his property by will to a particular person, and that such contract may be enforced in the courts after his decease, either by an action for a breach against the personal representative or in the proper case by a bill in the nature of specific performance against his heirs, devisees, or personal representative."

Price vs. *Wallace*, 224 Fed., 576, 578, per Wolverton, J.: "Another factor in the inquiry is that the alleged agreement to make a will, and the modification thereof, sought to be enforced, are in parol, and their sufficiency on this account is questioned. I need not stop to inquire as to this. It may be conceded, without inquiring, but without deciding, that such and kindred agreements in parol are legally sufficient to justify their enforcement, but with the qualifications, first, that they must be reasonably definite and certain; second, they must be established by clear, full, and irrefragable evidence; and, third, they must have been performed to such an extent and in such a manner that the beneficiary cannot be properly compensated in damages."

Morrison vs. *Land*, 169 Cal., 580, 584, 585; 147 Pac., 259, was an action to recover damages for breach of a contract to bequeath the plaintiff $50,000. "There is no dissent in the authorities from the proposition that one may make a valid contract with another, to devise or bequeath property by his last will in a certain specified way. It is clear, that in the event of a breach of such a contract, the party damaged has an action at law for the damage caused by such breach of the promissor, and in some cases this, by reason of the circumstances may be his only remedy, for a resort to any equitable remedy can be had only where the circumstances are such as to make the case one within the well settled principles relative to the proper exercise of equitable jurisdiction."

Skinner vs. *Rasche*, 165 Kentucky, 108, 114: "Appellant seems to take the view that the cross petition filed by her sought to fasten a trust upon the property of which Mrs. Clayton died seized and thereby to obtain a performance of the contract to

devise. Appellee takes the position that the cross petition was an action to recover compensation for the breach of the contract to devise. See *McGuire* vs. *McGuire*, 11 Bush. 142. Either of these remedies may be pursued by one in whose behalf such a contract has been made when there is a breach thereof."

In *Wellington* vs. *Apthorp*, 145 Mass. 69, 72, 73, 74. The Supreme Court of Massachusetts sustained an action at common law against an administrator upon an oral agreement made by the plaintiff with the intestate "to bequeath to him by her last will the "sum of $5,000 and pay his expenses of a journey to California and Nevada in accompanying her there in the fall of 1878." The Court said: "It is not contended on behalf of the defendant that a contract founded on a sufficient consideration to make a certain provision by will for a particular person is invalid at law. The contrary is well settled * * *. It is therefore in law competent for a valid oral contract to be made to leave a certain sum of money by will to a particular person, in consideration of services thereafter to be rendered by the promissee to the promissor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promissee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it." This decision has been followed in a number of cases, amongst others, *Kvell* vs. *Codman*, 154 Mass. 454, 456, where the opinion was written by Mr. Justice Holmes.

In *Clark* vs. *Cordray*, 69 Mo. Appeals, 6, 14, an action at common law was sustained in a similar case, the court said: "The case stated by the peti-

tion before us is that in consideration that the plaintiff would permit the deceased to come to his hotel as often as he pleased and remain as long as he pleased, without charge, the deceased would in his will bequeath to the plaintiff $2,000; that the plaintiff performed the consideration on his part, and that the deceased failed to make the said testamentary provision as he had agreed to do. There is nothing in any of the cases within or without this State to which our attention has been called which announces any principle that is an impediment to the plaintiff's right to recover on the agreement in this form of action. We must think that the defendant's objection to the petition is not well taken."

In *Van Houten* vs. *Van Houten*, 98 Atl. 251, the New Jersey Court of Errors affirmed a judgment at common law for $10,000 damages against an executor for the failure of his testator to bequeath a legacy of that amount as he had agreed to do.

In *Ball* vs. *James*, Iowa, June, 1916, 158 N. W. 684, 688; "an agreement based upon a valuable consideration to make a will in favor of another is valid, and damages are recoverable on its breach."

Bell vs. *Shewitt's Executors*, 24 Ind. 280. *Headnote*:

"A agreed orally with B, in consideration that the latter would continue to live with him as a laborer on his farm, that, in addition to the usual wages for such labor, he would leave to B, in his last will the sum of $500. Suit by B against the executors of A, alleging that he had continued "to live with, and labor for A, up to the time of his death, and that A had failed to make the promised provision in his will. *Held*, that the agreement was not affected by the Statute of Frauds, first, because

it had been performed by B; and second, because it was such an agreement as might have been performed within one year, by the death of A. *Held*, also, that an action will lie upon the contract against the executors."

Caviness vs. *Rushton*, 101 Ind., 500, 502, per Elliott, J.: "A promise founded upon a valuable consideration to make provision by will, is a valid contract, and an action will lie for its breach." To the same effect is *Robinson* vs. *Foust*, 31 Ind. App., 384, 389.

V.

This is not a question which is to be decided according to the State Law.

Lindsay vs. *First National Bank*, 156 U. S., 485, 593: "The case is thus brought within the rule, which this Court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles."

Whitehead vs. *Shattuck*, 138 U. S., 146, 151: "It would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration, which would take the matter from one Court to the other; but this may be said that where an action is simply for the recovery and possession of specific

real or personal property, or for the recovery of a money judgment, the action is one at law. * * * The law of this State cannot control the proceedings in the Federal Courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the Courts of the United States, in any case where a plain, adequate and complete remedy may be had at law, or the constitutional right of the parties in actions at law to a trial by a jury."

Wehrman vs. *Conklin*, 155 U. S., 314, 325: "The real question, then, to be determined in this case is, whether the plaintiffs have an adequate remedy at law. If they have, then section 723 is controlling, and, notwithstanding a local practice under the code, where no discrimination is made between actions at law and in equity, may authorize such suit, Federal courts will not entertain the bill, but will remit the parties to their remedy at law."

VI.

The same rule has been enforced in the State of New York.

Lisk vs. *Sherman*, 25 Barbour, 433. This was an action against the executor of a woman to recover damages for breach of an oral contract to make a bequest to plaintiff in return for services. The Court said, speaking through Judge Wells, at page 438: "In cases where the payment by the vendee has been in services or property, without any value fixed by the agreement upon either, the value of the property, whether real or personal, which was to be delivered or conveyed, is the true measure of damages. In other words it is the

value of the services or property, which the party receiving agreed to pay for them. In such cases it is said the contract furnishes the measure of damages. * * * The actual value of the services and property is after all the true criterion by which to regulate the amount of the recovery in such cases.

Lenox vs. *Lenox*, 126 App. Div., 105, 109, held that a suit based upon a failure to make a will in accordance with an agreement could only be brought in equity when the facts were sufficient to establish an equitable lien upon or trust in specific land and that in all other cases the remedy was an action at law for damages. "Construing the language of the defendant James Lenox and the acts claimed to have been done pursuant thereto most favorably to Elwin had he been living, we think he would only have had a cause of action at law against his father as for breach of contract. If in such action a contract was established, as claimed, and the father had repudiated it or rendered performance on his part impossible, Elwin would have been entitled to such judgment as would represent the damages sustained by him because of its breach by James Lenox, provided he had performed or was ready to perform the obligations assumed by him. * * * But independent of such consideration we conclude that plaintiff's cause of action against the defendant was *one at law* and not in equity. That her cause of action, if any, arises because of a breach of contract by the defendant entered into between him and her, and it not appearing that the defendant is not responsible and able to respond in any damages sustained because of such breach, no case is made out for the intervention of a court of equity."

See also

Martin vs. *Wright's Extr's.*, 13 Wend., 460;
Patterson vs. *Patterson*, 13 Johns., 379;
Jacobson vs. *Extrs. of Le Grange*, 3 Johns, 199;
Quackenbush vs. *Ehle*, 5 Barb., 469;
Lisk vs. *Sherman*, 25 Barb., 433;
Shakspeare vs. *Markham*, 10 Hun, 323, S. C. 72 N. Y., 400;
Robinson vs. *Raynor*, 28 N. Y., 494;
Kent vs. *Kent*, 62 N. Y., 560.

VII.

By the law of New York every right that is cognizable by the courts is a right at common law, including those which by the former practice could be enforced only by a court of equity.

The only distinction between such rights is that the State Constitution guarantees a trial by jury in most, but not all, cases which formerly were cognizable at common law. The New York Constitution in Article I, Section 2 ordains as follows: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

When a New York Judge says that a right is cognizable in equity, he uses an archaic phrase to express the idea that no party to the same has a right to a trial by jury. The right to a jury trial

is one which the Constitution and Statutes of the United States have jealously preserved in the Federal Courts and which has been by such Constitution and Statutes placed in the care of the Federal Judges who have exclusive jurisdiction to determine when the same shall be maintained without regard to the State Statutes or decisions upon the subject. (*Lindsay* vs. *First National Bank*, 156 U. S., 485, and other cases quoted under V, supra.)

Section 3339 of the New York Code of Civil Procedure which is in that respect a re-enactment of Section 69 of the New York Code of Procedure of 1848 written by David Dudley Field, is as follows: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

VIII.

The cases cited by the defendants below are not in point.

In no one of them was an attempt made to recover damages for breach of a promise to bequeath a legacy of a certain amount of money.

Winne vs. *Winne*, 166 N. Y., 263, 266, was brought against the heir-at-law to enforce a specific performance of a promise to devise land to the plaintiff. Since the contract related to real estate and was not in writing the Statute of Frauds prevented its enforcements at common law. The dictum at page 272, "in this case a suit in equity was doubtless the only remedy the plaintiff had," referred to the fact that the contract was at common law.

Johnston vs. *Spicer*, 107 N. Y., 185, was a similar suit enforcing a contract to devise a specified interest in real estate. In that case the right to sue at law was not discussed.

Farmers L. & Tr. Co. vs. *Mortimer*, 219 N. Y., 290, merely held that a contract to execute a power of appointment in a certain way was against public policy and could not be enforced.

In *Wallace* vs. *Wallace*, 158 App. Div., 273, the Court affirmed a judgment refusing to grant a specific performance of an alleged contract to execute mutual wills giving each to the other the whole of his real estate and personal property. The question whether the remedy was in law or in equity was not considered.

The case of *Hamlin* vs. *Stevens*, 177 N. Y., 39, was similar to the Wallace case.

In *Re Kidd*, 188 N. Y., 274, 278, the contract in question was to devise and bequeath all of the property both real and personal or else a certain portion of the same dependent on the existence of other children. It was not a contract for a legacy of a specified amount. The Court did not there consider the right to sue for damages at common law.

Phalen vs. *U. S. Tr. Co.*, 186 N. Y., 178, was brought to enforce specific performance of an antinuptial contract to devise all the estate of the contractor both real and personal in a certain way.

Gall vs. *Gall*, 64 Hun, 597, was an action specifically to enforce a contract to devise and bequeath all the testator's property, real and personal. It was held that it was against public policy.

IX.

In case we are in error, when we assume that the order is not sufficiently final to support the issue of a writ of error to review the same, we respectfully ask the Court so to indicate in its opinion.

X.

The petitioner should have leave to file the petition and an order should issue directing Judge Hough and the District Court of the United States for the Southern District of New York to show cause why the writ of mandamus or the writ of prohibition or the writ of certiorari should not be granted.

Respectfully submitted,

ROGER FOSTER,
of Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
DEC 10 1917
JAMES D. MAHER,
Clerk.

No. 26 Orig.

Supreme Court of the United States

In the Matter

of

The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

RETURN OF CHARLES M. HOUGH, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

EDGAR T. BRACKETT,
Saratoga Springs, New York,
CLARKE M. ROSECRANTZ,
49 Wall St., New York, N. Y.,
Attorneys for Respondents.

Stillman Appellate Printing Co., 61 Broad St., N. Y.

IN THE

Supreme Court of the United States.

In the Matter

of

The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

RETURN OF CHARLES M. HOUGH, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

TO THE HONORABLE EDWARD DOUGLASS WHITE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In compliance with the rule to show cause why the prayer of petitioner should not be granted, issued by this

Honorable Court on November 12th, 1917, and served November 20th, 1917, the above named respondents do hereby respectfully present that

On the 16th day of May, 1917, a complaint was filed in the District Court of the United States for the Southern District of New York by Annie S. Simons, alleging herself to be a citizen and resident of the State of South Carolina, against William Nelson Cromwell, described in the summons as "Thomas Nelson Cromwell," and Louis H. Cramer, as executors under the Last Will and Testament of Frank Leslie, deceased, alleged in said complaint to be citizens and residents of the State of New York. Said complaint set out two causes of action, the first cause of action alleging the breach by defendants' testatrix of a contract made with petitioner to leave petitioner a legacy of fifty thousand dollars, the second alleging the breach by said testatrix of a contract with petitioner to pay her the reasonable value of services rendered by her to testatrix, the reasonable value of said services being alleged to be fifty thousand dollars, and said complaint claimed damages for the breach of said contracts in the sum of forty thousand dollars. Thereafter, and on the 27th day of June, 1917, an answer to said complaint was filed in said Court by Louis H. Cramer, as executor under the Last Will and Testament of said Frank Leslie, deceased, and thereafter, and on the 7th day of July, 1917, an answer to said complaint was filed in said Court by William Nelson Cromwell, as executor of the Last Will and Testament of Frank Leslie, deceased. Copies of the said complaint and the answers thereto are attached to the petition of petitioner herein as Exhibits A, B and C, respectively, but for greater certainty copies thereof are hereunto annexed and made a part of this return and are marked Exhibits A, B and C respectively.

On July 20, 1917, said defendants William Nelson Cromwell and Louis H. Cramer served upon petitioner's

attorney an affidavit and notice of motion "for an order remanding the first cause of action alleged herein to the Equity side of the Court and for such other and further relief as may be just, together with the costs of this motion," a copy of which motion papers is hereto annexed and made a part hereof and marked Exhibit D.

On September 27th, 1917, the said motion came on for argument before respondent, Charles M. Hough, United States Circuit Judge, who, having then been duly designated to hear motions in the District Court of the United States for the Southern District of New York, was then and there sitting in that capacity and for that purpose and had jurisdiction to hear and determine said motion and to make and enter an order thereon. The said respondent Charles M. Hough heard the counsel of the respective parties fully on all questions raised thereby. Thereafter, and on or about October 25, 1917, said Charles M. Hough, in the exercise of his jurisdiction and official discretion, granted said motion by an order made by him and entered on or about October 25, 1917, a copy of which is hereto annexed and made a part hereof, and marked Exhibit E. Said respondent Charles M. Hough rendered an opinion upon the said motion, a copy of which is hereto annexed and made a part hereof and marked Exhibit F.

Said order granting said motion was made upon due notice or upon the appearance of the parties and in the exercise of the jurisdiction and official discretion of said respondent Charles M. Hough, acting in the capacity hereinbefore stated.

In entering said order respondent Charles M. Hough acted under the authority and power conferred upon him by Section 274(a) of the Judicial Code; and, under said Section, respondent transferred the first cause of action set out in petitioner's complaint to the Equity side of the District Court because, after hearing the argument of counsel on both sides and on consideration of the ques-

tion and examination of the authorities, respondent was of the opinion that said first cause of action did not state a cause of action at law, but that if any relief could be afforded petitioner on the facts alleged in said first cause of action, such relief must be had in a Court of Equity.

This return includes all papers in the case relative to the said motion of William Nelson Cromwell and said Louis H. Cramer, as executors under the Last Will and Testament of Frank Leslie, deceased, and to the proceedings had thereon and the order entered thereon, and includes all parts of the record in said case of Simons vs. Cramer and Cromwell, which respondents are advised and believe are material for this Court to be advised of under the rule to show cause herein.

Clarke M. Rosecrantz, Esq., a member of the firm of Sullivan & Cromwell, attorneys for said William Nelson Cromwell, and Edgar T. Brackett, Esq., attorney for said Louis H. Cramer, having desired to be heard, in order to secure them such opportunity, the respondents hereby designate them, or such associate counsel as they may select, to present this return and to file such brief and make such argument as may be required on this rule to show cause.

Dated December 8, 1917.

CHARLES M. HOUGH,
Respondent,

THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK,
Martin D.J. Respondent,

EDGAR T. BRACKETT,
Saratoga Springs, New York.
CLARKE M. ROSECRANTZ,
49 Wall St., New York, N. Y.,
Attorneys for Respondents.

Exhibit A.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the Summons as Thomas Nelson Cromwell, and Louis H. Cramer, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

The plaintiff above named, by Roger Foster, her attorney, respectfully shows to this Court:

I. The plaintiff is and at all the times hereinafter mentioned and at the time of the commencement of this action was a citizen and resident of the City of Charleston in the State of South Carolina.

II. The defendant Cromwell above named, is and at all the times hereinafter mentioned, and at the time of the commencement of this action was a citizen and resident of the Borough of Manhattan, City, County and State of New York.

The defendant Cramer is and at all the times hereinafter mentioned and at the time of the commencement of this action was a citizen and resident of Saratoga Springs, in the County of Saratoga, State of New York.

III. On or about the 17th day of September, 1914, the above named Frank Leslie, who was a woman, a widow and childless, died in the City and County of New York of which she was a resident. She is hereinafter described as Mrs. Leslie. On or about December 7th, 1914, the Will of said Mrs. Leslie was admitted to probate by one of the Surrogates of the County of New York. The said Last Will and Testament appointed as executors of the said Mrs. Leslie, the above named defendants. On or about said last named date, letters testamentary under said Will and Testament were duly issued to the said defendants out of the Surrogates' Court of the County of New York and the said defendants duly accepted the same and qualified as such.

IV. The above named plaintiff is the cousin german of the said Mrs. Leslie. The father of the plaintiff was the brother of the father of said Mrs. Leslie.

V. For thirty years or more prior to her death, the said Mrs. Leslie knew only one other relative, a niece, as long as and as intimately as this plaintiff.

VI. At different times between the year 1899 and the year 1913 both inclusive, at the request of said Mrs. Leslie, this plaintiff acted as nurse and companion for the said Mrs. Leslie in the States of New York, New Jersey, and South Carolina, and on different journeys. The said services were laborious, painful and humiliating. The said services were performed at the following places and during approximately the following times, as well as at other times and places; during the months of October, November and December, 1899, at Sherry's Hotel, New York City. At that time and place this plaintiff nursed the said Mrs. Leslie, at the latter's request, through a severe illness of the said Mrs. Leslie. During said time this plaintiff, at the request of Mrs. Leslie occupied the same bed with

Mrs. Leslie, frequently bathed Mrs. Leslie and changed Mrs. Leslie's garments and suffered greatly through the loss of sleep because of the attention that she thus paid Mrs. Leslie. During said time she took her meals in the bedroom of Mrs. Leslie and she never left Mrs. Leslie's room except occasionally for a short drive when the weather permitted. Plaintiff consequently was unable to return to her home in Charleston, South Carolina, in time for Christmas and plaintiff was thus prevented from spending Christmas with plaintiff's aunt who had had charge of plaintiff during plaintiff's childhood and during said period of time from taking care of plaintiff's aunt who was then eighty years of age and blind, and with whom plaintiff had been accustomed to spend Christmas each year and to whom plaintiff had been for many years accustomed to give great care and attention. This neglect of plaintiff's aunt who died a few months later was necessitated by the said services performed by plaintiff to the said Mrs. Leslie at Mrs. Leslie's request and was a cause of great grief to plaintiff.

VII. Immediately after a stroke of paralysis from which the said Mrs. Leslie had suffered, during the months of February, March and April, 1902, at the Chelsea Hotel in the City of New York, and in the City of Charleston, South Carolina, and on a journey from New York City to South Carolina, the plaintiff, at Mrs. Leslie's request, nursed Mrs. Leslie and took the place of a trained nurse who was discharged upon the arrival of the plaintiff in New York. During this period of time Mrs. Leslie could not without assistance walk nor could she dress nor undress herself without aid, which aid and assistance was given Mrs. Leslie by plaintiff, at Mrs. Leslie's request. Mrs. Leslie requested and insisted that this plaintiff should remain within her call by day and by night since Mrs. Leslie was in constant fear of another stroke of paralysis, and plaintiff so remained.

VIII. During the winters of the years 1903 and 1904 the said plaintiff at the request of Mrs. Leslie acted as constant nurse and companion for Mrs. Leslie at Charleston, South Carolina.

During the late summer and early fall of 1904, 1905, 1906, 1907, 1908, 1909 and 1913, in the City of New York, this plaintiff at the request of Mrs. Leslie acted as companion for Mrs. Leslie at the Chelsea Hotel and subsequently at the Sherman Square Hotel for a period of time, the exact amount of which is now unknown to plaintiff.

During the summer and early fall of 1913 this plaintiff acted as nurse and companion for Mrs. Leslie at Hampton Park Terrace, in Cranford, New Jersey, and in the Sherman Square Hotel in the City of New York.

During the two years which upon information and belief were the years 1905 and 1906 this plaintiff spent approximately two months in the winter of each of said years in the City of New York as companion and nurse for Mrs. Leslie at Mrs. Leslie's request. During all of these times that plaintiff was acting as nurse and companion for Mrs. Leslie she was, at Mrs. Leslie's request acting as maid for a dog of Mrs. Leslie, whose disposition was spoiled and to whom Mrs. Leslie insisted and requested that great care and attention should be given by plaintiff as was done by plaintiff who took said dog out of the hotel where Mrs. Leslie lived for said dog's exercise and that the dog might obey the calls of nature. On one occasion in the fall of 1913, plaintiff was subjected to abuse from Mrs. Leslie because plaintiff refused to take the said dog out for exercise on Broadway at night, while dressed only in a kimona, as directed so to do by Mrs. Leslie, and finally to appease the anger of Mrs. Leslie plaintiff put on a raincoat, and so dressed went out on Broadway with the said dog.

IX. The said Mrs. Leslie at the time of her death was seventy-eight years of age. During all said times, Mrs.

Leslie was feeble in body and suffered from a complication of diseases and was in consequence thereof, in a highly irritable and nervous condition. She was then arbitrary and dominant; accustomed to exact strict compliance with her wishes by this plaintiff and by everyone who came in contact with her and she was a very difficult person to get along with. Her physical and mental condition was such that she had need of a nurse and companion of her own sex, and her own class. She was unable to keep in her service as a companion or as a nurse people of ordinary circumstances upon ordinary terms for any length of time because of the lack of consideration with which she treated them and the duties which she insisted upon their performing. She was unwilling to treat and did not treat with courtesy or consideration those dependent upon her. She was then penurious in disposition and unwilling to pay during her life adequate compensation for services of that nature. Upon information and belief; she was accustomed to obtain the services of men and women (even of hotel bell boys and porters), without paying them any compensation, upon her promise to compensate them by legacies in her Will. Her estate was large, approximating in value $1,800,000.

Her nature and disposition were so irascible that she became frequently involved in quarrels and misunderstandings and antagonisms with many with whom she had business and social and personal relations. This subjected plaintiff to many difficulties and humiliations. For example, on one occasion Mrs. Leslie was ordered out of a dining car because she insisted in feeding her dog at the table, thus violating the rules of the car. Plaintiff was obliged to leave the car with Mrs. Leslie in the presence of a number of people and afterwards to return to the car and obtain food which she carried thence to Mrs. Leslie and her dog in the car in which Mrs. Leslie had a seat.

The said Mrs. Leslie was at all of the times herein mentioned of a very penurious disposition. For example

in September, 1913, she forbade this plaintiff to take cream with her coffee at breakfast at the Sherman Square Hotel because there was an additional charge of ten cents for the service of cream. She often loudly complained at the hotel dining rooms that the plaintiff ate too much, which was not the case. Mrs. Leslie obliged this plaintiff to live at hotels in a manner not fit and at a scale much below that to which this plaintiff was accustomed. For example, the room furnished this plaintiff at the Chelsea Hotel was small, dark, improperly ventilated and not intended for the purposes of a bedroom, and injurious to health. The heat in said room was at times so intense as to cause plaintiff to have vertigo and bleeding from the nose. The room furnished plaintiff at the Sherman Square Hotel was of a like nature. Plaintiff was not permitted to have any light in her room at night. The bed furnished plaintiff was a cot, and plaintiff frequently had to supply her own bed linen and towels because of Mrs. Leslie's failure to provide a proper and sufficient supply and change of same. The room, bed, and bath used by plaintiff at the Sherman Square Hotel had been used by a companion of Mrs. Leslie who had suffered with, and died of a cancer while acting as a companion for Mrs. Leslie. Mrs. Leslie interfered with the personal life of this plaintiff. She insisted that this plaintiff should dress so as to please the said Mrs. Leslie. This resulted in much discomfort and mortification to this plaintiff. For example, on one occasion in or about the month of September, 1913, plaintiff was obliged to attend a luncheon in a silk petticoat because said Mrs. Leslie objected to the plaintiff's wearing any of the dresses which were then in plaintiff's possession.

X. In consideration of the performances of the said services by plaintiff as aforesaid and of plaintiff's continuance in the performance of the same said Mrs. Leslie promised to bequeath to this plaintiff by her Last Will and Testament a legacy of the sum of $50,000. Said promise

was made in or about the month of February, 1902, and was repeated on subsequent occasions. In consideration of said promise the services hereinbefore set forth were performed by plaintiff.

XI. The said Will of said Mrs. Leslie left this plaintiff no more than the sum of $10,000.

XII. By the action of the said Mrs. Leslie as aforesaid this plaintiff has been damaged in the sum of $40,000 with interest from September 17th, 1915.

Wherefore this plaintiff prays judgment against the defendants for the sum of forty thousand ($40,000) dollars with interest from September 17th, 1917, and for such other and further relief in the premises as may be just together with the costs of this action.

And this plaintiff alleges as a second, distinct and separate cause of action:

XIII. She repeats and refers to the previous allegations herein designated by the paragraph numbers I, II, III, IV, V, VI, VI , VIII and IX and she incorporates the same in this complaint with the same effect as if the same were repeated herein specifically and at length.

XIV. Said Mrs. Leslie promised to pay to this plaintiff the reasonable value for said services.

XV. The reasonable value of said services was the sum of fifty thousand ($50,000) dollars.

XVI. Mrs. Leslie has not paid this plaintiff any part of the same except the sum of ten thousand ($10,000) dollars which said Mrs. Leslie bequeathed this plaintiff by her Will.

XVII. By the action of Mrs. Leslie as aforesaid, this plaintiff has been damaged in the sum of forty thousand ($40,000) dollars with interest from September 17th, 1915.

Wherefore plaintiff demands judgment against defendants for the sum of $40,000 with interest as aforesaid and for such other and further relief in the premises as may be just together with the costs of this action.

ROGER FOSTER,
Attorney for Plaintiff,
55 Liberty Street,
Manhattan, New York.

State of South Carolina, }
County of Charleston, } ss.:

Annie S. Simons, being duly sworn, deposes and says: I am the plaintiff above named. The foregoing complaint is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe the same to be true.

ANNIE S. SIMONS.

Sworn to before me this 13th }
day of June, 1917. }
WM. HENRY PARKER,
(Notarial Not. Pub. S. D.
Seal)

Exhibit B.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the Summons as Thomas Nelson Cromwell, and Louis H. Cramer, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

The defendant, Louis H. Cramer, executor, by Edgar T. Brackett, his attorney, answers the complaint herein as follows:

1st. Said defendant admits the allegations contained in the paragraphs of said complaint numbered II, III, IV and XI.

2nd. Said defendant denies all of the allegations in the paragraphs of said complaint numbered XII, XV and XVII.

3rd. Said defendant denies that he has any knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained, except as to those hereinbefore specifically admitted or controverted.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION:

4th. The said defendant avers that, excluding from the computation of the time which has elapsed since the accruing of the first alleged cause of action set forth in the complaint herein, the period of eighteen months which have elapsed since the death of the said Frank Leslie, the said alleged cause of action did not accrue within six years next before the commencement of this action.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION:

5th. Said defendant avers that the alleged agreement, by its terms, was not to be performed within one year from the making thereof. That no such agreement, or any note or memorandum thereof, was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent.

FOR A FOURTH, SEPARATE AND PARTIAL DEFENSE TO THE SECOND CAUSE OF ACTION:

6th. Said defendant alleges that as to all services alleged in said second cause of action to have been rendered prior to November 16, 1909, the said cause of action therefor did not accrue within the six years just prior to the commencement of said action, after excluding from the computation of time the period of eighteen months which elapsed immediately after the death of the said Frank Leslie.

Wherefore, the defendant Cramer prays that the complaint be dismissed with costs.

EDGAR T. BRACKETT,
Attorney for Defendant Cramer,
Town Hall,
Saratoga Springs, N. Y.

State of New York }
County of Saratoga } ss.:

Louis H. Cramer, being duly sworn, says that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LOUIS H. CRAMER.

Subscribed and sworn to before me }
this 17th day of June, 1917. }

HIRAM C. TODD,
Notary Public.

(Notarial Seal)

Exhibit C.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the Summons as "Thomas" Nelson Cromwell, and Louis H. Cramer, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

The defendant, William Nelson Cromwell as Executor, by Sullivan & Cromwell his attorneys, answers the complaint herein as follows:

First. Said defendant admits the allegations contained in paragraphs numbered II and III of said complaint.

Second. Said defendant denies on information and belief each and every allegation in the paragraphs numbered XV and XVII of said complaint.

Third. Said defendant denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in said complaint except as to those allegations herein expressly admitted or denied.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

Fourth. Said defendant avers that excluding from the computation of the time which has elapsed since the accruing of the first alleged cause of action set forth in the complaint herein (if such ever accrued) the period of eighteen months which has elapsed since the death of the said Frank Leslie, the said alleged cause of action did not accrue within six (6) years next before the commencement of this action.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

Fifth. Said defendant avers, on information and belief, that the agreement alleged in paragraph numbered X of the complaint herein, if such agreement was in fact entered into, was by its terms not to be performed within one (1) year from the making thereof; that neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent.

FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

Sixth. Said defendant avers, on information and belief, that the agreement alleged in paragraph numbered X of the complaint herein, if such agreement was in fact entered into, was for the sale of goods, chattels or things in action for the price of fifty dollars ($50) or more; that neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent; nor did the said Annie

S. Simons, at the time of the alleged agreement, accept or receive any part of such goods; nor did the said Annie S. Simons, at the said time, pay any part of the purchase price.

FOR A SECOND, SEPARATE AND PARTIAL DEFENSE TO THE SECOND CAUSE OF ACTION ALLEGED IN THE COMPLAINT.

Seventh. Said defendant avers that as to all services alleged in said second cause of action to have been rendered prior to December 14, 1909, the said alleged cause of action therefor did not accrue within six (6) years next before the commencement of this action after excluding from the computation of the time which has elapsed since the accruing of said alleged cause of action, the period of eighteen (18) months which has elapsed since the death of the said Frank Leslie.

Wherefore, the defendant Cromwell asks that the complaint herein be dismissed with costs.

SULLIVAN & CROMWELL,
Attorneys for Defendant Cromwell as Executor,
49 Wall Street,
New York, N. Y.

State of New York }
County of New York } ss.:

Clarke M. Rosecrantz, being duly sworn, deposes and says: that he is a member of the firm of Sullivan & Cromwell, attorneys for the defendant William Nelson Cromwell in the above entitled action, and resides at Hotel Plaza, in the City, County and State of New York, and has his office at 49 Wall Street, in the City, County and State of New York; that he has read the foregoing answer

and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further states that the reason why this verification is not made by said defendant is that said defendant is not within the said County of New York but is at Paris, France.

Deponent further says that the grounds of deponent's belief are as follows: that he has a general knowledge of the value of services of the kind and nature set forth in the second cause of action of the complaint therein; that he is familiar with the affairs of the estate of Frank Leslie, deceased, and has examined the effects and papers of said decedent and has failed to find among them any memorandum, writing or note evidencing any agreement of the kind and nature set forth in the first cause of action in the complaint herein.

CLARKE M. ROSECRANTZ.

Sworn to before me this 5th day of July, 1917.

WALTER J. STEWART,
Notary Public,
Richmond Co., N. Y. No. 68,
Certif. Filed N. Y. Co., County Clerk No. 55,
Register No. 9165.

Exhibit D.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the summons as "Thomas" Nelson Cromwell, and Louis H. Cramer, as Executors under the last Will and Testament of Frank Leslie, deceased,
Defendants.

Sir:

Please take notice that upon the annexed affidavit of Eustace Seligman, verified the 20th day of July, 1917, and upon the complaint and answer herein, the undersigned will apply to this Court at a Special Term for motions thereof to be held in the Post Office Building in the City of New York on the 26th day of July, 1917, at 10.00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order remanding the first cause of action alleged herein to the equity side of the Court, and

for such other and further relief as may be just together with the costs of this motion.

Dated, July 20, 1917.

SULLIVAN & CROMWELL,
Attorneys for Defendant,
William Nelson Cromwell, Exec.,
49 Wall Street,
New York, N. Y.

EDGAR T. BRACKETT,
Attorney for Defendant,
Louis H. Cramer, Exec.,
Saratoga Springs,
New York.

To ROGER FOSTER, Esq.,
Attorney for Plaintiff,
55 Liberty Street,
New York, N. Y.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the summons as "Thomas" Nelson Cromwell, and Louis H. Cramer, as Executors under the last Will and Testament of Frank Leslie, deceased,
Defendants.

State of New York, }
County of New York, } ss.:

Eustace Seligman, being duly sworn, deposes and says that he is associated with Sullivan & Cromwell, attorneys for William Nelson Cromwell, executor, one of the defendants herein.

That this action was commenced against the defendant William Nelson Cromwell on June 15, 1917, and that the said defendant served his answer herein on July 5, 1917.

That this action has been placed by Plaintiff upon the docket on the law side of the Court, its number being L 17-20, and that a notice that this action will be brought to trial at a term held for trials of common law causes on the 2nd day of October, 1917 has been served by plaintiff herein on July 10th, 1917.

That the first cause of action alleged in the complaint herein is one upon an alleged contract with the decedent Frank Leslie to make a bequest to the plaintiff. That such first cause of action stated in such complaint does not con-

stitute a cause of action at law but if any constitutes a cause of action in equity.

Wherefore, deponent respectfully requests that the motion to remand the first cause of action alleged in the complaint herein to the equity side of this Court be granted.

EUSTACE SELIGMAN.

Sworn to before me this 20th day of July, 1917.

JOHN J. TIERNEY,
Notary Public,
Kings Co., N. Y., No. 2, Reg. No. 8001.
Certificates Filed,
New York Co., N. Y., No 12, Reg. No. 8019,
Bronx Co. N. Y., No. 2, Reg. No 811.

Exhibit E.

At a Stated Term of the United States District Court for the Southern District of New York held in and for the Southern District of New York at the Post Office Building, New York City, on the 25th day of October, 1917.

Present—Honorable CHARLES M. HOUGH, Circuit Judge.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the Summons as "Thomas Nelson Cromwell" and Louis H. Cramer, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

Upon reading and filing the notice of motion to transfer the first cause of action set forth in the complaint herein to the equity side of this Court and the affidavit thereto annexed, verified by Eustace Seligman the 20th day of July, 1917, and after hearing Clarke M. Rosecrantz, Esq., and Hiram C. Todd, Esq., of counsel for the defendants for the motion and Roger Foster, Esq., attorney for the plaintiff in opposition thereto, and the same having been duly considered by the Court,

Now, on motion of Sullivan & Cromwell, attorneys for William Nelson Cromwell as executor of the Last Will and Testament of Frank Leslie, deceased, and Edgar T.

Brackett, Esq., attorney for Louis H. Cramer as executor of the Last Will and Testament of Frank Leslie, deceased, it is

Ordered that the said motion be and the same hereby is granted and the first cause of action set forth in the complaint herein be and the same hereby is transferred to the equity side of this Court; and further

Ordered that the said first cause of action be and the same is hereby stricken out of the complaint in this action at law (but only for the purpose of transfer as aforesaid) and that plaintiff have (and she is hereby given) twenty days after the service of this order wherein to make such amendment to the complaint herein (after the said striking out and transfer aforesaid) as she may be advised; and further

Ordered that the Clerk of this Court do forthwith and as of the date of this order docket as an equity cause the said first cause of action set forth in the said complaint, and the plaintiff is hereby given twenty days from the service of this order wherein to amend or replead on the equity side of this Court, and defendants are hereby given twenty days from the expiration of said twenty days hereinabove given to plaintiff for the filing and service of an amended bill in equity (as the case may be) wherein to answer without prejudice to any motion that said defendants may be advised to make under and pursuant to the rules of the Supreme Court of the United States in equity; and further

Ordered that the trial of this action at law be and the same hereby is stayed until (at the earliest) the term of December, 1917, without prejudice to any application that plaintiff may be advised to make for a stay of proceedings or further deferment of trial, when and if said plaintiff takes an appeal or sues out a writ of error or otherwise lawfully seeks to review this order or any part thereof.

C. M. Hough,
Cir. J.

Exhibit F.

"I think the law of New York is clear and plaintiff cannot sustain the first cause of action at law.

The use of 274a to sever an action is new, but seems to me proper.

Motion granted.

C. M. H.,
C. J.

Dated 10/5/17."

20

No. 26 Orig.

Office Supreme Court, U. S.
FILED
DEC 10 1917
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

In the Matter

of

The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF RESPONDENTS ON RETURN TO RULE TO SHOW CAUSE.

EDGAR T. BRACKETT,
Saratoga Springs, New York,
CLARKE M. ROSECRANTZ,
49 Wall St., New York, N. Y.,
Attorneys for Respondents.

Stillman Appellate Printing Co., 51 Broad St., N. Y.

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IN THE

Supreme Court of the United States.

In the Matter

of

The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF RESPONDENTS ON RETURN TO RULE TO SHOW CAUSE.

Statement.

The admitted facts presented by the petition and the return of respondents may be summarized as follows:

The petitioner here is the plaintiff in an action at law commenced in the United States District Court for the Southern District of New York. Respondents are Judge Charles M. Hough of the Circuit Court of Appeals, sitting to hear motions in the District Court, and the District

Court. Petitioner in her action at law is suing the executors under a will. Her complaint sets out two causes of action. The first cause of action (or in common law parlance the first count of her declaration) counts on a promise made by defendants' testatrix to leave plaintiff a legacy of $50,000. The consideration for this promise was services performed by plaintiff for testatrix. The second cause of action (or in common law parlance the second count of the declaration) is substantially in *quantum meruit* for services performed by plaintiff for testatrix.

Defendants took the position that under the law of the State (New York) in which the promise to leave plaintiff a legacy was made and was to be performed, a contract to make a will is invalid and cannot be sued on in an action at law,—although in certain cases the courts of the State will grant relief on a bill in equity. If this view of the law is correct, what we will hereafter call the first count of plaintiff's declaration (since the questions involved are really common law questions and not dependent on code pleading) does not state a cause of action at law. That being the case the defendants could, but for section 274a of the Judicial Code (38 Stat. L., 956) have demurred to this count or taken any of the other steps before or after verdict permitted by the State practice which would have resulted in putting plaintiff out of court on that count. If the defendants had adopted this course (and assuming section 274a to be out of the way) and if the Court had ruled in their favor on the question of law thus presented, the action of the Court would have been reviewable in the ordinary course by writ of error to the District Court after final judgment in the case.

Section 274a of the Judicial Code, however, is as follows:

> "In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the

court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

Under this section, therefore, the defendants moved to have the plaintiff's first cause of action transferred from the common law side to the equity side of the Court, and this motion was allowed by an order of the Court, which order is set out on pages 5 and 6 of petitioner's petition, and also in the return of respondents (Exhibit E).

The question on this petition is whether the action of the District Court in entering this order can be reviewed in this Court by mandamus, prohibition, or certiorari.

BRIEF OF ARGUMENT.

I.

The order of the Court herein sought to be reviewed can clearly be reviewed in due course on writ of error after final judgment in the common law action.

It is stated in the petition (p. 8) that there will be a serious obstacle to the review of the order in question on writ of error after final judgment in the action at law. The reason assigned is that the order of severance has become a part of the record in equity. Very likely the order of severance *has* become a part of the record in equity; but it obviously does not follow that the order does not also remain a part of the record in the action at law. Indeed it is perfectly manifest that the order does remain a part of

that record. It is just as much a part of the record in the action at law as an order sustaining a demurrer to the first count of the declaration would have been, or as an order, before or after verdict, dismissing the first count, or as any other order on any other motion by the defendants, with the object of raising and having decided the question whether or not the first count of the declaration stated a cause of action at law. It is the order which (whatever be its effect as instating the case as an equity case) puts the plaintiff, on the first count of her declaration, out of court in her action at law. It was entered by the Court sitting as a court of law on a motion made by the defendants in the action at law. The argument therefore is quite untenable that the order, on proper exceptions taken to it, could not be reviewed on writ of error after final judgment in the action at law. No authority is cited by petitioner for her position in this respect, and it is plain that no authority could be cited.

The result is, that, with respect to the order considered as an order entered in the action at law, petitioner is in the same position in which any plaintiff in an action at law finds himself who has had a demurrer sustained to one of the counts of his declaration (or who has had a count dismissed or a pleading struck). Under the Federal practice which permits writs of error only to review final decisions, a plaintiff in such a case must wait for final judgment in the case before being entitled to have reviewed the action of the Court in sustaining such a demurrer to a bad count in the declaration; and, since at common law there can be only one judgment in an action at law, this means that the plaintiff must wait before having the action of the Court with respect to the bad count reviewed until the issues on the remaining good count or counts have been adjudicated. But after such final judgment the question raised by the demurrer to the bad count can be reviewed as well as any other question.

There is, therefore, nothing in the situation of petitioner which entitles her to a speedier review of the lower Court's action here than there would be if Section 274a had never been enacted.

But it is suggested in the petition, if plaintiff does amend and proceeds in equity she will be deemed to have waived the error in transferring the count to the equity side, and so be precluded from raising the question on writ of error. Possibly she will. Probably she will. But what of it? Nobody is compelling her to amend if she does not want to. If she prefers not to take the benefit of the section she is under no obligation to. She may elect to abide by her declaration. If she so elects she will be in precisely the same situation that she would have been in had the section not been enacted. The law was not made to enable her to try her case both at law and in equity. By refusing to amend and proceed in equity she would be saying in substance, "My first count *does* state a good cause of action at law and I insist on a trial by jury." Which (if she is right about the law) she will get, like any other plaintiff in like case, by excepting to the order, biding her time, and obtaining a reversal and remandment on writ of error after final judgment.

II.

Petitioner is possibly entitled to an immediate review of the action of the Trial Court on writ of error from the Circuit Court of Appeals.

We concede that this proposition is debatable. We think it fairly arguable, however, that in view of the powers conferred by Section 274a, the order in question can be regarded as a final decision for the purposes of appeal.

The reason is this: We have already stated that, since there can be only one judgment in an action at law, there can, under common law procedure, be no final disposition of one bad count in a declaration so long as other good counts remain undisposed of. Is not, however, the effect of Section 274a, in a case such as this, to authorize a severance; and does not that severance operate as a final disposition of the cause of action which, by the order of severance, is transferred from the common law to the equity side?

In other words, is not the effect of the severance and transfer authorized by Section 274a *to create an exception to the common law rule that there can be only one final judgment in an action at law?* If, under this section, the Court is empowered (as we shall hereafter try to show that it is empowered) to transfer from the law side to the equity side a declaration (or a count of a declaration) which has been improperly brought on the law side, the order so transferring it might well be held to operate as a final judgment against a plaintiff with respect to his right of action at law on that declaration (or count). *Otherwise it would have to be held that the case (or the part of the case) was pending at one and the same time both as an action at law and as a suit in equity.* The order in question in terms strikes out of the complaint in the action at law the plaintiff's first cause of action. It strikes it out "only for the purpose of transfer." In other words, it strikes it out to reinstate it as a proceeding in equity. But the proceeding in equity is, of course, a separate and distinct law suit from the proceeding at law, which latter proceeding will continue only as to the second cause of action set up in the complaint.

The order, therefore, would seem to be a final decision within Section 128 of the Judicial Code (36 Stat. L. 1133 as amended by 38 Stat. L. 803). The order is more than

an order sustaining the demurrer; it is, under the powers conferred by Section 274a, to all intents and purposes so far as the action at law is concerned, a final judgment against plaintiff on the bad count of her declaration.

In *Forgay vs. Conrad,* 6 How. 200, 203, the Court spoke as follows:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature."

In *Crooker vs. Knudsen,* 232 Fed., 857, 858, the Circuit Court of Appeals for the 9th Circuit spoke as follows (italics ours):

> "The Circuit Courts of Appeals are given no right to review other than final judgments, except injunction orders, and no judgment is final which does not terminate the litigation between the parties on the merits of the case, *or on some severable phase thereof,* nor until it is entered in a court from which execution can issue. *Green vs. Van Buskirk,* 3 Wall., 448, 18 L. Ed., 245; *Bostwick vs. Brinkerhoff,* 106 U. S., 3, 1 Sup. Ct., 15, 27 L. Ed., 73; *St. L. I. M. & S. R. Co. vs. Southern Ex. Co.,* 108 U. S., 24, 2 Sup. Ct., 6, 27 L. Ed., 638; *Southern Ry. Co. vs. Postal Tel. Co.,* 179 U. S., 641, 21 Sup. Ct., 249, 45 L. Ed., 355; *Heike vs. United States,* 217 U. S., 423, 30 Sup. Ct., 539, 54 L. Ed., 821."

It is true that the cases in which decisions on some distinctly severable phase of a controversy have been held final for the purpose of appeal seem all to be equity cases; but there would appear to be no reason why, in a proper case, the same rule should not apply to actions at law. The difficulty in the way of applying the rule to actions at

law is the general principle that there can be only one judgment in such an action; but as we have tried to show, the effect of Section 274a is precisely to create an exception to this general rule by permitting the severance of two counts in a common law action so as to reinstate one of them as a suit in equity.

In the case of *Scriven vs. North*, 134 Fed., 366 (C. C. A., 4th Circuit), a bill in equity set up four distinct causes of action. One was for the infringement of a patent, one for the infringement of a trademark, and two for unfair competition. After hearing on all four causes of action a decree was entered dismissing the bill as to the first three but sustaining it as to the fourth, and decreeing an accounting thereunder. It was held that the decree dismissing the bill as to the first three causes of action was a final decision under the statute regulating appeals. This case is cited on page 10 of petitioner's brief. The Court said at p. 368:

> "As to the three first mentioned, the decree in its essence and in terms, is final. The injunction prayed for is refused, and the bill is dismissed. As to the fourth cause of action, the bill is retained and an account ordered to be taken. Each is a severable matter from the other subjects of controversy, and the accounting as to the unfair competition in the matter of the boxes does not affect the finality of the decree as to the three other distinct and separate causes of action."

See also the following cases cited by petitioner:

Hill vs. Chicago & Evanston R. R. Co., 140 U. S., 52;

Miocene Ditch Co. vs. Moore, 150 Fed., 483.

If the above position is sound petitioner has an immediate right of review by writ of error out of the Circuit Court of Appeals. We do not press the point, but we should like the Court to consider it.

It should be observed in this connection that the two counts of the declaration are not merely different ways of stating the same cause of action. Neither do they state different and alternative causes of action arising out of the same transaction. In the first count plaintiff says that, in consideration for services rendered, testatrix promised to leave her $50,000 by will. In the second count plaintiff says that, in consideration for services rendered, testatrix promised to pay her their reasonable value. These are two quite different contracts, and the two causes of action, therefore, are in their nature fairly severable.

III.

Under Section 274a the Court had the power to transfer the first cause of action from the law side to the equity side.

It is true that Section 274a says nothing about the transfer of a case or of part of a case from the law side to the equity side or from the equity side to the law side. The first sentence of the section, however, reads as follows:

> "In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice."

The question is, *what sort of amendments* does this refer to? Does it mean that the Court shall order the pleadings amended so as to make a declaration in an action at law state a good cause of action at law, or does it mean that the Court shall order the pleadings in a declaration at law which do not state a cause of action at law, but do state facts upon which relief may be obtained by bill in equity, amended so as to convert them into a bill in equity?

Obviously it means the latter. The section is not an ordinary statute of amendments. There is probably not a state in the Union in which the plaintiff in a common law action, whose declaration is demurred to on the ground that it does not state a cause of action at law (whether or not it also happens to state facts on which relief could be obtained in equity is immaterial) will not, if the demurrer is sustained, be given leave to amend so as to make his declaration state a cause of action at law. Provided, of course, the Court can see that there is a reasonable chance of curing the defect by amendment. The object of the Section 274a is broader than this,—being precisely to protect a plaintiff where he could *not* amend to state a good cause of action at law, against being put out of Court altogether. The Court, therefore, shall order that he make the necessary amendments to change his declaration at law into a bill in equity. And *vice versa*. The amendment of the pleadings spoken of are amendments "to conform them to the proper practice"; and they are not ordered except in cases where it is found that *an action at law should have been brought in equity or a suit in equity should have been brought at law.*

If this is the proper construction of the section it follows that an order of transfer from the law to the equity side, or from the equity to the law side, as the case may be, is not only proper but *necessary* in order to get the case instated on the side of the Court where it will have to be tried,—namely, on the *other* side.

Counsel for petitioner relies on the second sentence of the section giving "any party to the suit" at any stage of the cause the right to amend his pleadings "to obviate the objection that his suit was not brought on the right side of the Court." Does not this provision merely mean that the party who has come into the wrong side need not wait for the objection to be made by the adverse party, but may on his own motion be given leave to transfer and amend?

Does it so qualify the first sentence as to make that sentence mean that the amendments which the Court shall order shall be ordered only on motion of the party who has brought himself in on the wrong side? We think not.

It is said (petitioner's brief, p. 12) that it was not the intention of the section "to compel him against his will to proceed upon a different side of the Court from that which he had elected." No court can compel a party to proceed against his will in any case on any side of the Court. What the Court can do, and what respondent Judge Hough did here, was in effect to say, "If you want to go ahead, you must go ahead on the other side, and to enable you to do so I transfer the case and order you to make the necessary amendments." *Petitioner argues as though the "order" to amend were a peremptory mandate disobedience of which would be contempt of court.* The order, of course, is merely an order to amend if she wants to go ahead, and to enable her to do this the case is transferred. It is said that the proper procedure is "not to compel him to go to the other side * * * but to dismiss his suit at the appropriate time in the cause." But the Court *did* dismiss the count as a common law count ("only for the purpose of transfer"); and what more appropriate time to dismiss than upon the determination of the question whether it stated a cause of action at law? It is submitted that the distinction between an order reading: "If you elect to amend and proceed in equity I will transfer the case. If not, I will dismiss," and an order reading: "I dismiss and transfer and order you to amend" is a purely verbal one. In either case it is for the plaintiff to determine whether he will *proceed on the other side.* If he elects not to do so, he has his remedy by exception to the order. *What possible benefit could petitioner have derived from having her first cause of action retained on the law side until she had elected to amend?* The Court had

held that it did not state a cause of action. Consequently it would never be *tried* on the law side until the Court's decision should be reversed, and, as already shown, she may, on exception, have her writ of error to reverse it at the proper time.

Petitioner has cited *Waldo vs. Wilson,* 231 Fed., 654. What the Court said in that case about Section 274a was really by way of dictum, for it appeared that the section was enacted after the institution of the suit and after its transfer from the law to the equity docket (see p. 657).

It is also urged that the section does not authorize a severance. No authority for this proposition is cited. The section is remedial and should be liberally construed. A plaintiff in an action at law ought not to be deprived of his right to have one of the counts of his declaration transferred to the equity side, merely because another count of the declaration happens to state a good cause of action at law. Besides, how, in such a case, is the *plaintiff* injured by an order of severance? A severance is all that will save him from being put out of court altogether.

Judge HOUGH's opinion states:

> "The use of Section 274a to sever an action is new but it seems to me proper."

It is submitted that there is no reason for holding that the section applies only to suits in their entirety. The section permits "any amendments to the pleadings which may be necessary to conform them to the proper practice." "Any amendments" surely includes amendments to parts of the pleadings.

Under the heading of petitioner's brief dealing with the power of the Court to order a transfer under this section, reference is made to the constitutional right to trial by jury (p. 12). It is not perceived how this right enters into the question here presented. Petitioner, of course, has a right to trial by jury if she has a cause of action at

law. If she has not, no such right exists. If she has not a cause of action at law her declaration at law is demurrable. If her declaration states facts entitling her to equitable relief, Section 274a gives her the right to obtain that relief without the institution of a new suit. So far, however, as her right at law is concerned her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the plaintiff will, after reversal and remandment, obtain her jury trial.

IV.

Petitioner is not entitled to the writ of mandamus.

Two questions must be kept distinct:

FIRST: Assuming that, under Section 274a, the Court has the right to transfer to the right side of the Court a suit originally instituted on the wrong side, can the ruling of respondent that the suit has been instituted on the wrong side be reviewed by mandamus?

SECOND: *Assuming that a suit has been instituted on the wrong side of the court,* does Section 274a authorize, on the motion of the adverse party, a transfer to the right side, and if it does not, can the action of the Court in transferring it be reviewed by mandamus?

These questions are distinct, and we shall therefore treat them separately.

(a) AS TO THE FIRST QUESTION:

It is obvious that under Section 274a the "subject matter" of which the Court is given jurisdiction is precisely the determination of the question whether or not a suit has been instituted on the right side of the Court. If a

Judge decides this question wrongly he is merely committing error, and not exceeding his jurisdiction. He is deciding, though erroneously, exactly what Section 274a makes it his duty to decide. We have already shown that if the Court erred in holding that the first count of plaintiff's declaration did not set up a good cause of action at law, his ruling can be reviewed by writ of error. This brings the case squarely within the usual rule that the writ of mandamus cannot be used to serve the purpose of an appeal.

The situation here cannot be distinguished from the attempt to review by mandamus the refusal to remand to a State Court, in a case where the question whether the case was removable can be determined as a question of law on the record. This was the question elaborately discussed and finally set at rest in *Ex parte Harding,* 219 U. S., 363. The jurisdiction of the Court to determine the question of law whether or not the first count of plaintiff's declaration stated a common law cause of action is plain. The right of plaintiff to review on writ of error the Court's determination of that question is plain. The citation of other authorities, therefore, hardly appears necessary.

We may, however, briefly comment on a few of the cases cited by the petitioner.

Ex parte Metropolitan Water Company of West Virginia, 220 U. S., 539.

In that case a single Judge had assumed to exercise statutory powers, which it was held the statute had conferred only on a tribunal consisting of three Judges. His action was reviewed by mandamus on the specific ground that the single Judge had no jurisdiction over the subject matter of the proceeding. The subject matter of the proceeding was the granting or denying of an interlocutory injunction against state officers in the enforcement of a

State statute, and the statute made no provision for an appeal from an order by a single Judge denying such an injunction, and the right of appeal was not otherwise given by statute. It is true that the action of the single Judge could have been eventually reviewed on appeal, but the nonexistence of the right to a prompt review of a matter so important as the granting or denial of an interlocutory injunction may be, clearly made the remedy by appeal inadequate. The inadequacy of this remedy and the assumption of jurisdiction, of course, took the case out of the usual rule.

Brown vs. Circuit Judge of Kalamazoo County, 75 Mich., 274.

This was another case in which the action reviewed by mandamus was beyond the jurisdiction of the Court. The Court said:

> "The case has never been heard at all in any legal way. The judge whose action was reviewed had acted in obedience to the statute which the reviewing court held unconstitutional."

State of Washington ex rel. Wyman, Partridge & Co. vs. Spokane County, 82 Pac., 875 (Wash., 1915).

In this case mandamus was allowed to review the action of the lower Court on a motion for a change of venue. It is unnecessary to discuss the case since, in so far as it might be held pertinent to the question here, it is to all intents and purposes in direct conflict with the recent decision of this Court in *Ex parte American Steel Barrel Co.,* 230 U. S., 35. In that case this Court refused to review by mandamus the action of a senior Circuit Judge, under Section 21 of the Judicial Code, in designating another District Judge than the Judge before whom the proceed-

ings were being had, to hear the case. The Court said, p. 45:

> "It is obvious that if the designation of Judge Mayer under these conditions was wholly beyond the judicial power of the senior circuit judge, his authority to make any order or decree acting thereunder might have been excepted to and thus made the subject of review in due course of law.
>
> The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte* Newman, 14 Wall., 152, 165; Bayard vs. U. S., 127 U. S., 246; *In re* Morrison, 147 U. S., 14."

Ex parte Uppercu, 239 U. S., 435.

In this case this Court issued a mandamus to the Judges and clerk of a United States District Court to compel them to allow documentary evidence which had been introduced in another lawsuit, but which had been sealed by order of the Court, to be opened in order that petitioner might use them in evidence in his lawsuit. It is obvious that the holding there has no bearing whatever on the question here. The writ there was not issued to review any action of the Court in petitioner's case, and petitioner obviously had no other remedy than mandamus.

It is said (petitioner's brief, p. 7), "The effect of the order of severance is to grant a perpetual stay of proceedings to enforce the first cause of action at common law and to enjoin the further prosecution thereof at common law." If this statement were correct the writ certainly ought to issue (see cases cited in petitioner's brief),—though, as in such cases the writ issues in aid of the appellate jurisdiction of the Court issuing it, it would seem that the petition here should have been brought in the Circuit Court of Appeals. The simple answer, however, is, that the statement is incorrect. The order in question "stays" the first cause of action and "enjoins" the prosecution of it

just as much and just as little as an order sustaining a demurrer to or dismissing a count "stays" or "enjoins" the proceedings under that count. The writ "will also issue to compel a court to proceed to judgment" (petitioner's brief, p. 7). The Court will, in due course, proceed to judgment in this case, after which petitioner may have her writ of error.

(b) As to the second question:

This question relates to the power of the Court under Section 274a to enter *the particular order it did*, and we have already tried to show that under that section the Court has power to transfer a case or a part of a case. If this is so, the Court had jurisdiction in respect of the particular *procedure* employed (*i. e.*, by way of severance and transfer), as well as jurisdiction to determine plaintiff's substantive common law rights. If this is not so, it may possibly be said that technically the Court had no jurisdiction of the "subject matter" of his order, since the section empowered him only to authorize or direct amendments in pleadings and not to order the transfer of a case from one side of the Court to the other. But it by no means follows that mandamus will lie to correct this "jurisdictional" trespass,—if such it can be called. We have already shown that it is of no vital consequence to petitioner in this case (indeed that it is really of no consequence at all) whether or not the first count of her declaration be "transferred" to the equity side of the Court before or after she elects to amend and proceed on that side. She is deprived of no substantial right by the order *considered as an order transferring a part of her suit, as distinguished from an order merely allowing her to amend.* If she had been able to amend the first count of her declaration so as to make it a good count *at law*, she would doubtless have been allowed to do so had she made the request. No such request was made. And even if it had been made and had been refused, she would have had precisely the same remedy

that she now has,—namely, by writ of error after final judgment.

On this branch of the question, therefore, it is clear that no such prejudicial usurpation of jurisdiction has been committed as will warrant the issuance of any of these extraordinary writs (*Ex parte Harding, supra; Ex parte American Steel Barrel Co., supra*). The question whether or not the Court had the right under Section 274a to transfer the case is a purely technical one. It is impossible to bring the case within the rule of such cases as *Virginia vs. Rives,* 100 U. S., 313, and *Virginia vs. Paul,* 148 U. S., 107, or of any of the other cases where the writ has issued though review could have been had by appeal or writ of error. The important and only vital question to petitioner is whether or not the first count of her declaration states a common law cause of action. If respondent decided that question wrongly, he was merely deciding wrongly the very question which Section 274a obliges him to decide, and, as already shown, his conduct in this regard can certainly not be reviewed by mandamus.

V.

The right to prohibition or certiorari depends on precisely the same considerations determining the right to mandamus.

It seems hardly necessary to argue this point. The right to any or all of these three writs turns, in a case like this, on precisely the same considerations. No reason has been advanced in petitioner's brief, and no reason can be advanced, why, if mandamus will not lie here, either prohibition or certiorari will. If mandamus is granted respondent will be ordered to do something. If prohibition, not to do something. If certiorari, his order will be quashed. Either remedy will be efficacious and all come

to the same thing. The requests for prohibition and certiorari were evidently thrown in for good measure.

Indeed, with respect to prohibition, there would seem to be serious doubt whether it will lie even if mandamus or certiorari will. This, by reason of the decisions which seem to indicate that, in view of Section 234 of the Judicial Code (36 Stat. L., 1156) prohibition will not issue out of this Court to a District Court, except in admiralty cases, or specifically in aid of the Court's appellate jurisdiction.

See

Ex parte Christy, 3 How., 292;
Ex parte Gordon, 1 Black, 503;
Ex parte Graham, 10 Wall., 541;
Ex parte Easton, 95 U. S., 68;
In Re Massachusetts, 197 U. S., 482;
Ex parte Joins, 191 U. S., 93, 102.

We may call attention here to the following statement in petitioner's brief (p. 8):

> "It is *well settled* that *this court* has power to grant the writ of prohibition in cases other than those arising in admiralty where the District Court has exceeded its jurisdiction" (Italics ours).

The case cited as authority for this statement is *United States vs. Mayer*, 235 U. S., 55, in which case, this Court was reviewing the action of a Circuit Court of Appeals in granting the writ. We leave it to the learned author of "Foster on Federal Practice" to reconcile the above quoted statement with the statement on the same subject in his last edition of that work (Sec. 456). However, as stated by the Court in *Ex Parte Joins, supra:*

> "We need not consider whether the jurisdiction of this Court to grant a writ of prohibition to the District Courts is confined to cases where those courts are 'proceeding as courts of admiralty and maritime jurisdiction'."

VI.

An oral contract to make a will is not in New York a valid contract on which an action at law may be maintained, though in certain cases relief may be had in equity.

At the outset we should like to dispose of the argument made in petitioner's brief (p. 15) that the New York cases on which we have relied are not in point as showing the New York Law to be as stated in the above heading. The reason assigned is that the cases concern contracts to devise an interest in land or to leave by will all of the testator's property. It is said, "In the first class of cases the land could not be recovered at common law since there was no contract in writing to convey the same. The plaintiff consequently was obliged to apply for the usual equitable relief when an oral contract to convey land has been partly performed. Such relief could only be had in equity." All that this goes to show is that in such cases the remedy at law, *if it exists*, is not adequate. If the Court in these cases had been meeting the argument that the action should have been at law instead of in equity, this comment would be pertinent. But that was not the case. *The argument the Court was meeting was that there could be no relief in equity because the contract was one which was not recognized as a valid contract at law.* There is nothing in any of these cases to the effect that contracts to make wills are invalid at law only when the promise is one to devise land or when it is to leave all one's property.

It must be admitted that all of the cases on which we rely were equity cases, and that the question has not been squarely raised and passed upon in an action to recover a money judgment for breach of a promise to make a will. It is submitted nevertheless that the following recent New

York decisions show the rule to have been established in New York that contracts (at least oral contracts) to make wills are invalid at law—not because they are in technical contravention either of the Statute of Wills or of the Statute of Frauds, but because they are in contravention of the policy which those statutes declare. The New York courts therefore afford relief only in equity, according to equitable principles, where the agreement is clearly established, is definite in its terms, and where to refuse relief would be manifestly unjust. The relief afforded is by way of impressing a trust upon the property in the hands of devisees, legatees, executors, or administrators, as the case may be.

In *Winne vs. Winne*, 166 N. Y., 263, specific performance was sought of a contract to make a bequest. The objection was made that an action at common law could not be maintained on such an agreement. The Court said (p. 271):

> *"Nor is it a bar to the granting of such relief that an action at common law could not be maintained upon the agreement. There are many contracts upon which an action at law cannot be maintained, which are enforced in equity by a decree for specific performance.* Indeed, the inadequacy of a legal remedy is one of the considerations upon which this branch of equity jurisprudence is founded and the equitable remedy frequently enforced. 'The inadequacy of the legal remedy may consist in the fact either that no action at law will lie, or that damages would not afford an adequate compensation' (2 Beach on Mod. Eq. Jurispru., Sec. 636). *'There are agreements which the common law, by virtue of its own doctrines, irrespective of statutory regulation, treats as invalid, as not contracts, and for which it furnishes no remedy; but which equity, in the application of its conscientious principles, considers as binding, and enforces by awarding its relief of a specific performance'* (Pomeroy on Specific Performance, Sec. 31).

The principle that a suit in equity may be maintained for the specific performance of an agreement, although an action at law could not be based upon it, is illustrated by cases of the transfer of possibility or expectancy of estates, assignments of things in action, contracts of married women, agreements invalid under the Statute of Frauds, agreements for the sale of land where the death of the vendor ensues before completion, agreements between a man and woman who afterwards marry, and verbal contracts which have been partially performed. In these and in many other cases, although an action at law could not be maintained, courts of equity hold such contracts as binding and decree their specific performance if free from objections which would generally prevent equitable relief (*Chase vs. Peck*, 21 N. Y., 581; *Husted vs. Ingraham*, 75 N. Y., 251; *Hale vs. Omaha Nat. Bank*, 49 N. Y., 626; *Freeman vs. Freeman*, 43 N. Y., 34; *Perry vs. Board of Missions, etc., of Albany*, 102 N. Y., 99; *Smith vs. Smith*, 125 N. Y., 224; *Sprague vs. Cochran*, 144 N. Y., 104; *Roberge vs. Winne*, 144 N. Y., 709). Hence, the fact that an action at law cannot be maintained upon an agreement, does not prevent a court of equity from enforcing it by specific performance. In this case a suit in equity was doubtless the only remedy that plaintiff had, and unless this action can be maintained and the judgment upheld, he is remediless, although the agreement has been fully and faithfully performed by him and his mother, and every principle of good conscience and natural justice requires its performance by the heirs at law and next of kin of the decedent.

The right to the specific performance of a contract rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of a sound discretion (*Seymour vs. Delancey*, 6 Johns. Ch., 222; *Margraf vs. Muir*, 57 N. Y., 155; *Conger vs. N. Y. W. S. & B. R. R. Co.*, 120 N. Y., 29; *Stokes vs. Stokes*, 155 N. Y., 590).

Therefore, in cases of this character, where it appears for any reason that the enforcement of an agreement would be unfair, inequitable or unjust, the rem-

edy should be denied. Each case must be governed by its own facts and circumstances, and unless the proof discloses a situation where good conscience and natural justice require the enforcement of the agreement, this relief should not be awarded" (Italics ours).

The above language was quoted with approval in *Hamlin vs. Stevens*, 177 N. Y., 39, 48.

In *Phalen vs. U. S. Trust Company*, 186 N. Y., 178, the doctrine is again enunciated, the Court saying (p. 181):

> *"For the purposes of this discussion we may assume that this action could not be maintained at law,* although there is very respectable authority to the contrary in England, where actions at law have been maintained even upon informal agreements of this nature (*Shadwell vs. Shadwell*, 30 L. J. [CP], 145; 9 C. B. [N. S.], 159; *Douglas vs. Vincent*, 2 Vernon, 201). One of the very purposes of equity is to aid where the law fails. In the determination of this appeal it should be borne in mind that a court of equity will take into consideration the facts and circumstances appearing when the case is tried."

Again (on p. 183):

> "We deem it unnecessary to discuss the intermediate cases which have fully and firmly established the principle that *a man's representatives shall be trustees of a resulting trust for the benefit of those to whom he has bound his estate by such a contract as is here involved,* for we consider the comparatively modern case of *Johnston vs. Spicer*, 107 N. Y., 185, decisive of this whole controversy."

Again (on p. 184):

> "Neither do we subscribe to the proposition that this complaint does not state a good cause of action, because the contract which it sets forth may be one which would not support an action at law. *There are many contracts upon which an action at law cannot be maintained that are enforceable in equity. 'There are agreements which the common law, by virtue of*

its own doctrines, irrespective of statutory regulation, treats as invalid, as not contracts, and for which it furnishes no remedy; but which equity, in the application of its conscientious principles, considers as binding, and enforces by awarding its relief of a specific performance' (Pomeroy on Specific Performance, Sec. 31). In *Sprague vs. Cochran*, 144 N. Y., 104, this principle was applied to take a case out of the operation of the Statute of Frauds, and to the same effect is *Smith vs. Smith*, 125 N. Y., 224. Many more cases might be cited to illustrate the rule that equity decrees performance of just contracts which are not enforceable at law, but this axiomatic fact needs no further demonstration" (Italics ours).

In *Mahaney vs. Carr*, 175 N. Y., 454, 458, the Court spoke as follows:

> "It was not an executory contract for the future conveyance or transfer of any specific property. It could not take effect until the death of the grandfather, and during his life he was not in default with respect to it, and yet this anomalous arrangement was, according to the judgment in this case, effective enough in law to nullify the gifts and conveyances made by the grandfather in his lifetime to his wife and the provisions of his will that took effect upon his death."

In *Wallace vs. Wallace*, 158 App. Div., 273, 281, it was said:

> "Of late years there have been in the Court of Appeals a series of cases which have very clearly and positively declared the rules which must govern in determining such a claim, namely, a claim that a decedent made a given contract to dispose of his or her estate at death in a different manner than he or she attempted to do."

The Court then proceeded to summarize these rules, one of which was:

> "(7) the alleged contract, or what it would accomplish, should seem to be equitable."

A legal claim stands apart from its equity. The above rule can apply only to an equitable right.

In the very recent case of *Farmers' Loan & Trust Company vs. Mortimer,* 219 N. Y., 290, the question was whether a contract to exercise a power of appointment by will was enforcible. In speaking of cases involving contracts to make a will the Court said (p. 294):

> "They are cases where contracts to make a will of one's own estate have been specifically enforced. Even where such a contract is made and broken, the later will is not invalid. Equity does not set it aside, but charges the property of the promisor with a trust which adheres to it in the hands of executors and legatees (*Phalen vs. U. S. Trust Co.,* 186 N. Y., 178; *Matter of Kidd,* 188 N. Y., 274, 279, 280)."

The public policy which has led the New York Courts to grant relief only in equity in cases of this sort is shown by the opinion in *Hamlin vs. Stevens,* 177 N. Y., 39, where the Court said (pp. 47, 50):

> "Contracts of the character in question have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them, and in enforcing them, when established, by specific performance. Such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is always dead when the question arises. They are the natural resort of unscrupulous persons who wish to despoil the estates of decedents.
>
> * * * * * * *
>
> Such contracts are dangerous. They threaten the security of estates and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and greatest temptation, with all the dangers which, as experience shows, surround such evidence."

This language was quoted with approval in *Ide vs. Brown*, 178 N. Y., 26.

In *Gall vs. Gall*, 64 Hun, 600, 603, the Court said:

> "It is vitally important that the statute of wills should be maintained in its integrity; and the courts should not, by lessening or weakening the well-defined prerequisites to specific performance, furnish a loophole for the evasion of its provisions. * * * There is another rule which should be strictly adhered to in this class of cases, and that is, that the remedy is a matter of judicial discretion, and that relief should be withheld where a decree for specific performance would work injustice to innocent third persons, or where it would be contrary to public policy."

Andrews vs. Brewster, 124 N. Y., 433, was an action at law for breach of a contract to make a will. The Court ordered a new trial. The question whether the action was maintainable was not raised or discussed.

Roberge vs. Bonner, 185 N. Y., 265, was the case of a promise to give money during the lifetime of the promissor or to leave it by will. In this case again a new trial was ordered and the question here discussed was not considered.

The only New York cases relied on by petitioner are *Lenox vs. Lenox*, 126 App. Div., 105, and *Lisk vs. Sherman*, 25 Barb., 433. In the first of those cases there appears to have been a promise to make a will, but the action was brought during the lifetime of the promissor on a promise to do something in his lifetime. The dictum of the Court quoted in petitioner's brief is therefore of little weight. *Lisk vs. Sherman* was a case in which, in return for personal services rendered, the decedent had promised to leave all her property to the plaintiff. It was held that recovery could be had on a *quantum meruit* for the value of the services, but not on the contract. There are a number of New York cases to this effect. If plaintiff in the case at bar has performed personal services for the testa-

trix for which she is entitled to receive compensation, she undoubtedly may recover the value of those services regardless of whether or not there was an express promise to pay for them, and regardless of whether or not the promise was a promise to pay for them during the life of testatrix or by a legacy. The objection to the first count of plaintiff's declaration is that it is a count in special assumpsit on the express promise to leave her $50,000 by will.

VII.

If the New York law is as above stated, it is a rule of substantive law and not a rule of procedure, and the Federal Courts will therefore apply it.

The law of the State in which the contract was made and was to be performed governs the question of its validity.

> *Scudder vs. Union National Bank,* 91 U. S., 406;
> *Pritchard vs. Norton,* 106 U. S., 124.

The contract of course was to be performed in New York since that was the domicile of testatrix. The complaint does not specifically allege in what state the contract was made, and in such a case therefore it will be assumed that it was made where it was to be performed. Counsel for petitioner is not contending that the New York rule would not apply for the reason that the contract was not made in New York.

If the position of the defendants was sound, contracts to make a will, made and to be performed in New York, are, under the New York law, invalid. The Federal Courts therefore will follow the New York law, and the cases cited on pages 22 and 23 of petitioner's brief are obviously not in point. They are all cases relating to remedies and not to substantive rights. In the first of them, *Lindsay*

vs. First National Bank, 156 U. S., 485, an action at law was brought in a Federal Court to have declared void an assessment under a tax law of the State and have its collection enjoined. This procedure was permitted by a Louisiana statute. It was held that the proceeding in the Federal Court must be in equity. In the other two cases, *Whitehead vs. Shattuck*, 138 U. S., 146, and *Wehrman vs. Conklin*, 155 U. S., 314, the question was as to the effect on federal equity jurisdiction of a state statute enlarging equity jurisdiction on bills to quiet title. It is plain that neither of these cases is in point. If the contract in question here is invalid it can be enforced at law in no court, whether state or federal.

VIII.

Petitioner's petition should be dismissed.

Respectfully submitted,

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mandamus will issue to correct an error which if left uncorrected will cause confusion and complications so great that serious inconvenience to the courts, and to the litigants, will result. *Virginia* v. *Rives*, 100 U. S. 313, 323, 329; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 540, 546; *Brown* v. *Circuit Judge of Kalamazoo County*, 75 Michigan, 274.

It is well settled that mandamus is the proper remedy to prevent the enforcement of an order for a change of venue made by a court having exclusive jurisdiction to hear and determine the proceeding, and with no power to send away the case for trial elsewhere; and that an appeal from the final judgment rendered by the court to which the venue is changed does not afford an adequate remedy. *Washington ex rel. Wyman, Partridge & Co.* v. *Spokane County*, 40 Wash. 443; *Ex parte Cox*, 10 Missouri, 742; *State ex rel. Harris* v. *Laughlin*, 75 Missouri, 358; *State ex rel. Schonhoff* v. *O'Bryan*, 102 Missouri, 254.

The effect of this order is to grant a perpetual stay of proceedings to enforce the first cause of action at common law and to enjoin the further prosecution thereof at common law. It is well settled that mandamus will issue to compel a court to proceed in a suit which it has improperly stayed. *Livingston* v. *Dayenois*, 7 Cranch, 577; *Barber Asphalt Pav. Co.* v. *Morris*, 132 Fed. Rep. 945; *McClellan* v. *Carland*, 217 U. S. 268.

It will also issue to compel a court to proceed to judgment. *Life & Fire Ins. Co.* v. *Wilson*, 8 Pet. 291; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 571; *Ex parte Equitable Trust Co.*, 231 Fed. Rep. 571, 585, 594; *In re Watts*, 214 Fed. Rep. 80; to compel a court to enforce its judgment, *Ex parte United States*, 242 U. S. 27; to compel a judge to permit documents on file in the clerk's office under seal to be produced, opened and put in evidence, *Ex parte Upperco*, 239 U. S. 435; to compel a court to overrule an

objection to a master's summons which required the defendant to render a sworn statement of an account in accordance with Equity Rule 79, *In re Beckwith*, 203 Fed. Rep. 45; 201 Fed. Rep. 518; to set aside an order of a District Court which modified a decree rendered at a previous term, although no appeal or writ of error was then pending or had been previously issued or taken, *Re Dowell*, 215 Fed. Rep. 673; see also *New Liverpool Salt Co.* v. *Wellborn*, 160 Fed. Rep. 923; to set aside an order disbarring an attorney which had been rendered without jurisdiction or after a proceeding in which the court below had acted with flagrant impropriety. *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 505. See also *Ex parte Wisner*, 203 U. S. 449; *In re Wisner*, 213 U. S. 458.

If mandamus will not lie, a writ of prohibition should be granted. *United States* v. *Mayer*, 235 U. S. 55; *Ex parte Indiana Transportation Co.*, 244 U. S. 456; *Ex parte Equitable Trust Co.*, 231 Fed. Rep. 271, 304; *Lehmann* v. *Gumbel*, 236 U. S. 448.

If neither of the foregoing writs can be obtained, the petitioner has the right to a writ of certiorari—the original writ issuable at common law which under its supervisory jurisdiction is vested in this court by § 262, Jud. Code, formerly Rev. Stats., § 716. *United States* v. *Beatty*, 232 U. S. 463, 467.

A District Court of the United States, when sitting in equity and when sitting at common law, exercises an independent jurisdiction and in the contemplation of the law constitutes two distinct courts just as much as when it is a court of admiralty and a court of bankruptcy. Jud. Code, § 24.

The petitioner has no less right to one of the extraordinary writs than if she had sued upon a single cause of action, and that had been sent from the common-law court to the court of equity. It is settled that when one of two separate and different causes of action joined together in a

single pleading has been dismissed, such dismissal may be reviewed without awaiting the termination of the issues raised upon the other causes of action. *Scriven v. North*, 134 Fed. Rep. 366; *Historical Pub. Co. v. Jones Bros. Pub. Co.*, 231 Fed. Rep. 784; *Miocene Ditch Co. v. Moore*, 160 Fed. Rep. 422, 423; *Hill v. Chicago & Evanston R. R. Co.*, 140 U. S. 52.

The District Court had no power to make the order. No statutory provision nor any equity or common-law rule gives such authority, although under Equity Rule 22 a motion may be made to send a cause from the equity to the common-law calendar. The object of this rule is to protect the constitutional right. No constitutional right is infringed by the trial of a case before a jury which might have been tried in equity. Section 274a, Jud. Code, merely authorizes amendments; it does not authorize a transfer in any case, *Walsh v. Wilson*, 231 Fed. Rep. 654; or a severance; and it was clearly not its intention to warrant a transfer upon compulsion against the wish of the plaintiff. If the plaintiff has selected a wrong side of the court upon which to proceed, the penalty upon him is not to compel him to go to the other side which he does not wish to enter, but to dismiss his suit at the appropriate time in the cause. Moreover, the statute does not purport to justify a transfer of part of a suit.

The Constitution forbids such a transfer of part and of the whole of a cause of action from law to equity, especially when the plaintiff claims the right to a trial by jury.

The first as well as the second cause of action was cognizable at common law. [Citing many cases.]

This is not a question which is to be decided according to the state law. *Lindsey v. First National Bank*, 156 U. S. 485, 503; *Whitehead v. Shattuck*, 138 U. S. 146, 151; *Wehrman v. Conklin*, 155 U. S. 314, 325.

The same rule has been enforced in the State of New York.

By the law of New York every right that is cognizable by the courts is a right at common law, including those which by the former practice could be enforced only by a court of equity.

Mr. Edgar T. Brackett, with whom *Mr. Clarke M. Bosworth* was on the brief, for respondents:

The order can clearly be reviewed on writ of error after final judgment in the common-law action. Very likely it has become a part of the record in equity; but it also remains a part of the record in the law action, no less so than would an order dismissing the first count, on demurrer or motion. It puts the plaintiff, on the first count, out of court in her action at law. It was entered by the court sitting as a court of law on a motion made by the defendants in the action at law. There is nothing in the situation of petitioner which entitles her to a speedier review here than there would be if Jud. Code, § 274a, had never been enacted.

She may waive her objection to the order if she amends and proceeds under it, but may elect to abide by her declaration. The law was not made to enable her to try her case both at law and in equity.

The petitioner is possibly entitled to an immediate review of the action of the trial court on writ of error from the Circuit Court of Appeals.

Under Jud. Code, § 274a, the court had the power to transfer the first cause of action from the law to the equity side. It is true the section says nothing about transfer. But it is not an ordinary statute of amendments. Its object is not to allow a pleading at law to be amended as such—a right already existing—but to protect the plaintiff where he could not amend to state a good cause of action at law, against being put out of court altogether. The court, therefore, shall order that he make the necessary amendments to change his declaration at law into a

bill in equity, and *vice versa*. It follows that an order of transfer from the law to the equity side, or from the equity to the law side, as the case may be, is not only proper but necessary, to get the case instated on the side of the court where it will have to be tried. The order in effect dismisses the cause of action wrongly sued upon at law, and, at the same time, for the plaintiff's benefit, transfers it so that he may proceed on the right side of the court if he see fit. The section authorizes a severance. It is remedial and should be liberally construed.

So far as petitioner's right at law is concerned, her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the petitioner will, after reversal and remandment, obtain her jury trial.

Petitioner is not entitled to the writ of mandamus. Under § 274a the subject-matter of which the court is given jurisdiction is precisely the determination of the question whether or not a suit has been instituted on the right side of the court. If a judge decides this question wrongly he is merely committing error, and not exceeding his jurisdiction. His ruling can be reviewed by writ of error. This brings the case squarely within the usual rule that the writ of mandamus cannot be used to serve the purpose of an appeal.

The situation here cannot be distinguished from the attempt to review by mandamus the refusal to remand to a state court, in a case where the question of removability can be determined as a question of law on the record. This was the question elaborately discussed and finally set at rest in *Ex parte Harding*, 219 U. S. 363. The jurisdiction of this court to determine the question of law whether or not the first count of plaintiff's declaration

stated a common law cause of action is plain. The right of plaintiff to review on writ of error the court's determination of that question is plain. Even if it be that, technically, the court had no jurisdiction of the subject-matter of its order, since the section (274a) empowered it only to authorize or direct amendments in pleadings and not to order the transfer of a case, it by no means follows that mandamus will lie to correct this "jurisdictional" trespass. It is of no consequence to petitioner whether or not the first count of her declaration be "transferred" to the equity side before or after she elects to amend and proceed on that side. She is deprived of no substantial right by the order considered as an order transferring a part of her suit, as distinguished from an order merely allowing her to amend. If she had been able to amend the first count of her declaration so as to make it a good count at law, she would doubtless have been allowed to do so had she made the request. No such request was made. And even if it had been made and had been refused, she would have had precisely the same remedy that she now has, namely, by writ of error after final judgment. The important and only vital question to petitioner is whether or not the first count of her declaration states a common-law cause of action. If respondent decided that question wrongly, he was merely deciding wrongly the very question which § 274a obliges him to decide, and, as already shown, his conduct in this regard can certainly not be reviewed by mandamus.

The right to prohibition or certiorari depends on precisely the same considerations determining the right to mandamus.

An oral contract to make a will is not in New York a valid contract on which an action at law may be maintained, though in certain cases relief may be had in equity. [Citations.]

If the New York law is as above stated, it is a rule

of substantive law and not a rule of procedure, and the federal courts will therefore apply it. *Swaddle* v. *Union National Bank*, 91 U. S. 406; *Pritchard* v. *Norton*, 106 U. S. 124. The cases cited by petitioner are all cases relating to remedies and not to substantive rights.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for mandamus, or, if that is denied, for prohibition or certiorari, to the District Court for the Southern District of New York upon the following facts. The petitioner brought an action in two counts against the executors of a widow named Mrs. Frank Leslie. The first count alleged a promise by Mrs. Leslie that if the plaintiff would perform certain personal services of attendance and care to her, she would bequeath to the plaintiff $50,000. It set forth the performance of the services in great detail, alleged the death of Mrs. Leslie and probate of her will, the bequest to the plaintiff of not more than $10,000, and claimed $40,000 with interest from one year after the death of the testatrix, as damages. The second count repeats by reference the averments of the first count, but alleges a promise to pay the reasonable value of the plaintiff's services, set at $50,000, of which $10,000 have been satisfied by legacy, and claims damages as before. On motion of the defendants the judge sitting to hear motions in the District Court ordered the first cause of action to be transferred to the equity side of the Court and docketed as an equity cause, and to be stricken out of the complaint in the action at law, but only for the purpose of transfer, allowing the plaintiff to amend, &c. The ground disclosed was that by the law of New York the

plaintiff could not sustain the first cause of action at law.

We do not find sufficient ground for the opinion of the judge in the New York decisions. No doubt alleged contracts to make a provision by will must be approached with great caution in the matter of proof, but there is no doubt that if proved they are valid so far as no statute intervenes. So much seems to be assumed by the order of the judge, and is the law we believe of New York as well as of other States and England. But if valid we see no reason why a contract to bequeath a certain sum should not give rise to an action for damages if broken, as certainly as a contract to pay the same sum in the contractor's life, or at the moment of the contractor's death. *Parker* v. *Coburn*, 10 Allen, 82. In cases of contracts to leave all the testator's property, including land, or a proportion of a residue requiring an account to ascertain it, equitable remedies have been thought proper, and in some such cases it has been assumed for the purposes of argument that an action would not lie at common law. See *Winne* v. *Winne*, 166 N. Y. 268. *Phalen* v. *United States Trust Co.*, 186 N. Y. 178. But we have seen nothing that suggests an arbitrary departure by the Courts of New York from the common law in cases like the present. See *Farmers' Loan & Trust Co.* v. *Mortimer*, 210 N. Y. 200, 206. *DeCicco* v. *Schweizer*, 221 N. Y. 431. *Sibstor's Case*, Popham, 148, 2 Roll. R. 104. *Fenton* v. *Embler*, 3 Burr. 1279. *Van Houten* v. *Van Houten*, 80 N. J. L. 301. *Krell* v. *Codman*, 154 Massachusetts, 454.

If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not

matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first court, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law. See *Brown* v. *Circuit Judge of Kalamazoo County*, 75 Michigan, 274.

Rule absolute.

EX PARTE SIMONS, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 26, Original. Argued December 10, 1917.—Rule absolute June 3, 1918.

Plaintiff brought an action for damages in two counts against executors, in the District Court in New York, the first count alleging a promise of the testatrix to bequeath a certain sum in return for plaintiff's services, and the second her promise to pay their reasonable value. On motion the first count was ordered transferred to the equity docket, upon the ground that by the law of New York it could not be entertained at law. *Held*, that this was an error, depriving plaintiff of the right of trial by jury, and properly rectified by mandamus. Rule absolute.

The case is stated in the opinion.

Mr. Roger Foster for petitioner:

Whenever a constitutional right has been denied, or a judge has acted clearly beyond his jurisdiction, and there is no immediate remedy by a writ of error or appeal,